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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 227

THE CREEK NATION,

Petitioner,

v.

C. W. McGHEE, RUBY Z. WEATHERFORD, JOHN V. PHILLIPS AND JOHN WILLIAMS, AS MEMBERS OF AND ON THE RELATION OF THE CREEK NATION EAST OF THE MISSISSIPPI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

Subject Index

	Page
Petition for Writ of Certiorari	1
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Statutes Involved	5
Statement	7
Specification of Errors to be Urged	13
Reasons for Granting the Writ	14
I. The holding of the Court of Claims is contrary to the express provisions and directions of the Indian Claims Commission Act	14
II. The decision of the Court of Claims is contrary to the established law and the decisions of this Court	30
a. It is well established that there can be no intervention without statutory authority	30
b. This court has held that an individual Indian of a tribe has no vested rights in tribal property in the absence of statute or treaty granting them such right	33
c. This Court has held in a similar case that individual Indians who abandon their tribe and elect to remain east of the Mississippi, while the main body of the tribe has moved to lands west of the Mississippi, lose their rights in the property of the tribe	37
d. The decision of the Court of Claims disregards the enrollment laws of the Creek Nation	

Page

laid down by Congress for Creeks in Oklahoma and elsewhere 41

III. The Court of Claims erred in holding that respondents are members of a "tribe, band, or other identifiable group of American Indians" within the meaning of the Indian Claims Commission Act 46

IV. This case presents conflicting views by two tribunals on the same questions which should be resolved by this Court 52

V. The questions involved arise under a comparatively new statute, and are common to many other pending cases before the Indian Claims Commission, which are being held up until these questions are resolved 53

Conclusion 53

CITATIONS

Cases:

Allen Calculators v. *National Cash Register Co.* and *The United States*, 322 U. S. 137-143 32

Blackfeather v. *United States*, 37 C. Cls. 233, 190 U. S. 368 48

Campbell v. *Wadsworth*, 248 U. S. 169 45

Cherokee Nation v. *Hitchcock*, 187 U. S. 294, 307 ..... 35, 36

Cherokee Nation v. *United States*, 40 C. Cls. 252, 326, 328, affirmed 202 U. S. 101, 130 and 225 U. S. 572, 575-580 ..... 29, 30, 31, 36, 37

Clyde F. Thompson et al., on relation of the Indians of California, Appeal No. 9, decided C. Cls. May 6, 1952 ..... 50, 51

Credits Commutation Co. v. *United States*, 177 U. S. 311 32

Creek Nation v. *United States*, 77 C. Cls. 226 ..... 17, 20, 21

Creek Nation v. *United States*, 63 C. Cls. 270, certiorari denied 274 U. S. 751 29

Page

Creek Nation v. *United States*, 74 C. Cls. 663 29
Eastern Band of Cherokee Indians v. *United States and Cherokee Nation*, 20 C. Cls. 449 aff., 117 U. S. 288, 293, 309-311 ..... 37, 38, 39
Ex Parte Cutting, 94 U. S. 15 32
New York v. *Consolidated Gas Co.*, 253 U. S. 219 32
New York v. *N. Y. Telegraph Co.*, 261 U. S. 312 32
Porter v. *Wilson*, 239 U. S. 170, 174-175 40
Re Egelhard & Sons Co., 231 U. S. 646 32
Re Leaf Tobacco Bd. of Trade, 222 U. S. 578, 581 32
Red Lake, Pembina and White Earth Bands, Ind. Cl. Comm. Docket No. 18-A, decided Sept. 17, 1951 50
United States v. *Atkins*, 260 U.S. 220 45
United States v. *Wildcat*, 244 U. S. 111 45
Western Cherokees v. *United States*, 27 C. Cls. 1, 53 ..... 33, 37

Treaties, agreements and statutes:

Creek Treaty of—

August 7, 1790, 7 Stat. 35, 2 Kapp. 25 ..... 8, 16, 27
June 29, 1796, 7 Stat. 56, 2 Kapp. 46 16
June 16, 1802, 7 Stat. 68, 2 Kapp. 58 ..... 16, 27
November 14, 1805, 7 Stat. 96, 2 Kapp. 85 .. 16
August 9, 1814, 7 Stat. 120, 2 Kapp. 107 .. 8, 16
January 22, 1818, 7 Stat. 171, 2 Kapp. 155 .. 16
January 8, 1821, 7 Stat. 215, 217, 2 Kapp. 195, 197 16
February 12, 1825, 7 Stat. 237, 2 Kapp. 214 .. 17
January 24, 1826, 7 Stat. 286, 2 Kapp. 264, 10, 17, 27
March 24, 1832, 7 Stat. 366, 2 Kapp. 341, 10, 18, 19, 27, 41
February 14, 1833, 7 Stat. 417, 2 Kapp. 388 .. 19, 20
January 4, 1845, 9 Stat. 821, 2 Kapp. 550, 552 ..... 26, 27

Page
August 7, 1856, 11 Stat. 699, 2 Kapp. 756 ... 26
June 14, 1866, 14 Stat. 785, 2 Kapp. 931 26

Agreement of March 1, 1889, c. 317, 25 Stat. 757, 759 26
Original Creek Agreement approved by Act of March 1, 1901, c. 676, 31 Stat. 861 ..... 26, 44, 45
Supplemental Creek Agreement approved by Act of June 30, 1902, c. 1323, 32 Stat. 500 26

Act of—
May 28, 1830, c. 148, 4 Stat. 411 15
February 8, 1887, c. 119, 24 Stat. 388 40
March 3, 1893, c. 209, 27 Stat. 612, 645 ..... 40, 42
June 10, 1896, c. 398, 29 Stat. 321, 339 ..... 42, 43
June 28, 1898, c. 517, 30 Stat. 495 ..... 28, 43
April 26, 1906, c. 1876, 34 Stat. 137 ..... 28, 45
May 8, 1906, c. 2348, 34 Stat. 182 40
August 13, 1946, 60 Stat. 1049 ..... 2, 5, 14, 31, 32

Miscellaneous:

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123 Am. St. Repts. p. 281, 296, 301 ..... 31, 49
Bull. 30, Bur. Amer. Eth., Pt. 1 (Handbook of American Indians) 16, 22
Cohen's Handbook of Federal Indian Law, pp. 183-185, 425 ..... 34, 35, 40
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Rept. Comr. Indian Affairs—
1851, p. 124 29
1853, p. 149 29
1855, p. 134 29

Page
Royce, Indian Land Cessions 16
Sen. Docs., Vol. 1, 24th Cong., 2d Sess., Cong. Ser. 297, p. 381 21
Sen. Docs., 25th Cong., 2d Sess., Cong. Ser. 314, pp. 538-539 21
Sen. Docs., Vol. 1, 25 Cong., 3 Sess., Cong. Ser. 338, p. 512 25
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28 U. S. C. 1255 2

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C. W. McGHEE, RUBY Z. WEATHERFORD, JOHN V. PHILLIPS AND JOHN WILLIAMS, AS MEMBERS OF AND ON THE RELATION OF THE CREEK NATION EAST OF THE MISSISSIPPI

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Creek Nation of Indians, formerly of Alabama, Georgia, and Mississippi, and since its removal by the United States to Indian Territory in 1836 and 1837, now Oklahoma, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above entitled cause on May 6, 1952.

Opinions Below

The opinion of the Indian Claims Commission (R. 87) is not reported. The opinion of the Court of Claims (R. 98) is not yet reported.

Jurisdiction

The judgment of the Court of Claims was entered on May 6, 1952 (R. 146). The jurisdiction of this Court rests upon 28 U. S. C. 1255 and Section 20(b) and (c) of the Act of August 13, 1946, 60 Stat. 1049, creating the Indian Claims Commission.

Questions Presented

1. Whether under the express provisions of the Indian Claims Commission Act an organized tribe of American Indians, in this case the Creek Nation, recognized as such by the United States from 1790 to date, has the exclusive right to prosecute a tribal claim against the United States resulting from the circumstances surrounding the execution of a treaty between said Creek Nation and the United States.

a. Whether the Creek Nation lost its identity as the Creek Nation when the United States forced it to cede its domain in Alabama and remove in a body to lands granted to it in Indian Territory, now Oklahoma.

b. Whether a temporary disruption of its government caused by the forced removal of the Creek Nation from lands east to lands west of the Mississippi River, would destroy its identity as the Creek Nation.

2. Whether in the absence of statutory authority, or rule of court, the Indian Claims Commission has the right to grant intervention in a case brought by an organized and recognized Indian tribe against the United States under the Indian Claims Commission Act.

a. Whether the decision of the Indian Claims Commission denying intervention is an appealable order.

b. Whether an unorganized and unenrolled aggregate of individuals never recognized by the United States as a "tribe, band or other identifiable group of American In-

dians," whose ancestors abandoned their tribe over 119 years ago, and who thereafter were content to be citizens of the States in which they resided and not members of an Indian tribe, and who elected not to remove to and for 119 years have not lived upon the tribal domain, and who are not recognized by the tribe as part of its membership, can intervene and attempt to settle their rights to participate in an award in a suit brought by the organized and recognized tribe before the Indian Claims Commission under the Indian Claims Commission Act, which limits suits by a "tribe, band, or other identifiable group of American Indians" against the United States.

Or stated in another way:

Whether under the Indian Claims Commission Act an unorganized aggregate of citizens of the United States, *never* recognized by the United States as American Indians, can intervene in a proceeding brought by an organized and recognized tribe of American Indians, and try their alleged individual rights as against the tribe to participate in an award, when the Indian Claims Commission Act limits suits to those of a "tribe, band or other identifiable group of American Indians" against the United States.

3. Whether individual members of an Indian tribe have a vested right in tribal property which can pass by inheritance to their heirs, in the absence of legislation or treaty giving them such vested rights.

4. Whether descendants of individual members of an Indian tribe, whose ancestors over 119 years ago abandoned their tribe by electing to remain east and became citizens of the States in which they resided, when the tribe ceded its lands east and as a whole removed to a new tribal domain west of the Mississippi River, can now participate in the distribution of property belonging to the tribe.

5. Whether individuals claiming to be Indians can disre-

gard the enrollment laws of an Indian tribe enacted by Congress, and which rolls by Act of Congress have been made final, and now claim the right to participate in tribal assets on equal terms with enrolled members when Congress specifically provided that only enrolled members of the tribe can participate in the distribution of the tribal estate.

a. Whether by the Indian Claims Commission Act Congress gave the Indian Claims Commission power to revise the enrollment of an Indian tribe, or to determine who are members entitled to participate in any award granted to an Indian tribe.

6. Whether an aggregate of individual citizens of the United States, unorganized and never recognized by the United States as a "tribe, band, or other identifiable group of American Indians", before the passage of the Indian Claims Commission Act, can be a "tribe, band, or other identifiable group of American Indians" within the meaning of said Act.

a. Whether said aggregate of individuals have a common claim against the United States when they seek to assert against an Indian tribe the individual rights of their ancestors to participate in the tribal estate.

b. Whether under the Indian Claims Commission Act the Indian Claims Commission, or the Court of Claims, has authority to create a "tribe, band, or other identifiable group of American Indians" out of an aggregate of individuals, when it is admitted that said individuals were never an organized "tribe, band, or other identifiable group of American Indians", and never recognized as such by the United States.

7. Which of two opposite decisions on the above questions —the decision of the Indian Claims Commission, or the decision of the Court of Claims *contra*—is correct.

Statutes Involved

The relevant portions of the Act of August 13, 1946, creating the Indian Claims Commission (60 Stat. 1049) are set forth as follows:

"Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States were subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

"All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

* * * * * * *

"Sec. 10. Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of

Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission.

• • • • • • •

"Sec. 20(b). When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting 'fair and honorable dealings', where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

"(c). Determinations of questions of law by the Court of Claims under this section shall be subject to review

by the Supreme Court of the United States in the manner prescribed by section 3 of the Act of February 13, 1925 (43 Stat. 939; 28 U. S. C., sec. 288), as amended."

Statement

This controversy is between the Creek Nation, an organized and recognized tribe of American Indians, and an aggregate of individual citizens of the United States, first styling themselves the "Perdido Friendly Creek Indian Band of Alabama and Northwest Florida Indians", later during this proceeding changing their name to "The Creek Nation East of the Mississippi", *never* organized and *never* recognized by the United States as a band of American Indians. Respondents seek to intervene in a suit brought by the Creek Nation before the Indian Claims Commission, claiming that their ancestors were members of the Creek Nation in 1814, when this claim arose, but which ancestors voluntarily elected to remain east of the Mississippi River when the whole Creek Nation removed to a new domain in Indian Territory, now the State of Oklahoma. Since the removal of the main body of the Creek Nation to the West in 1836, respondents' ancestors have never asserted their rights as Creek Indians, and now after 119 years of separation from the Creek Nation, respondents now raise the cry of "Brother", and assert their individual rights to participate in an award, if any, recovered by the Creek Nation.

The petition in this case was filed before the Indian Claims Commission on January 29, 1948 by the Creek Nation of Indians, an organized tribe of American Indians, recognized as such by the United States from 1790 to date, and formerly residing in Alabama, Georgia and Mississippi, until its removal in a body by the United States in 1836 and 1837 to its present location in Oklahoma (R. 1).

The petition alleges a claim against the United States for the value of that part of the Creek domain located in

what now constitutes portions of the States of Alabama, Georgia, and Mississippi, which the United States solemnly guaranteed to the Creek Nation under the Treaty of August 7, 1790, 7 Stat. 35 (the first treaty executed by the Creek Nation with the United States under which the Creek Nation agreed to come under the protection of the United States), and which lands the Creek Nation was required under duress to cede to the United States by the Treaty of August 9, 1814, 7 Stat. 120; 2 Kapp. 107, without compensation (R. 1-37).

The United States answered the petition (R. 37). Hearings were held in which both petitioner and the United States presented their evidence, and on November 29, 1950, the case was finally argued and submitted to the Indian Claims Commission for decision (R. 58).

After the case was submitted, one of counsel for respondent, then calling themselves the "Perdido Friendly Creek Indian Band of Alabama and Northwest Florida Indians," borrowed one of Petitioner-Plaintiff's briefs, and on January 5, 1951, filed a Motion to intervene and a petition for leave to intervene, claiming to be a "remnant of the Original Muskogee Confederation" and describing themselves as follows (R. 45-46, 48):

> "That your petitioner, constitutes a band comprising approximately 10,000 Creek Indians who remained in the land of their forefathers, in Alabama and Florida and were not placed on the Oklahoma Creek roll of 1907 as provided by the Act of 1906." *

The petition sought to enlarge the claim of the Creek Nation so as to include lands then beyond the territorial

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* In 1848 it was reported that about 100 Creeks still remained in Alabama (Indian Removal, by Grant Foreman, Univ. of Okla. Press, 1932, p. 190, footnote 35). A census roll of Creeks made in 1833 showed a total of 22,674 persons (*Ibid.*, p. 111). The final rolls of the Creek Nation, closed by the Act of April 26, 1906, 34 Stat. 137, show a total of 18,794 persons.

limits of the United States in Florida, and asserted an interest in common with the Creek Nation (R. 48-49).

This Motion was opposed by both the United States and the Creek Nation (R. 49, 59).

On April 4, 1951, said Perdido Band filed an amended Motion for Leave to Intervene, attaching thereto a petition of interveners (R. 60, 64). Said Motion states in part as follows (R. 61, 63):

> "1. a. Said Perdido Friendly Creek Indian Band of Alabama and Northwest Florida Indians (referred to hereinafter as the Perdido Band) is a band of Creek Indians in Alabama and Northwest Florida recently organized. Its members are descendants of members of the Creek nation of Indians who elected to remain in Alabama, Georgia and Florida under the Treaties of January 4, 1826, and March 24, 1832, where these Creeks have lived together in close but informal community relations from the period prior to the migration to the present time.
>
> "b. Applicants for leave to intervene claim under the right of and as descendants of the Creek nation, aboriginal occupants of lands in Georgia and Alabama.
>
> "c. Said Perdido Band therefore constitutes an identifiable group of Indians within the meaning of Section II of the Act of August 13, 1946, authorizing this Commission to hear and determine certain claims of such groups against the United States, and bring this motion for leave to intervene under the authority of that Act.
>
> "d. Said Perdido Band has not yet been recognized by the Secretary of the Interior.
>
> • • • • • • •
>
> "2. Petitioner in this proceeding, the Creek Nation, is the political body recognized by the Secretary of the Interior as representing those members of the original Creek nation of Georgia and Alabama who migrated westward beginning in 1826 and took up residence in

the Indian Territory, now the State of Oklahoma, where tribal lands were granted to them.

"3. The final rolls of petitioner, made for the purpose of allotment of lands in Indian Territory and distribution of moneys arising out of the allotment and sale of these lands, by Acts of Congress of June 28, 1898, March 1, 1901 and April 26, 1906, included only those Creeks living in the Indian Territory. These rolls were closed in 1907 for participation in this distribution."

* * * * * * *

"13. Applicants do not seek to alter or expand in any way in this proceeding the claim of the Creeks against the United States arising out of the Treaty of 1814, the merits of which are the principal issue in this proceeding. * * *"

The petition of said band alleges that the claim asserted in the petition of the Creek Nation belonged to all the descendants of Creek Indians constituting the Creek Nation in 1814, and therefore, the Creek Nation as now constituted represented only those Creeks who migrated to Oklahoma under the Treaties of January 24, 1826, and March 24, 1832, and did not represent those who remained east of the Mississippi River; and even though said band was unenrolled, unorganized and not recognized as members of the Creek Nation, they were entitled to participate in any award made.

The petition prays in part (R. 69):

"(2) that Interveners be declared entitled to share in said recovery on a per capita basis with all others who come before this Commission and establish that they are descendants of the members of the original Creek nation or, in the alternative, that a commission be created to determine and make a roll of the living descendants of members of the original Creek nation, in order to determine who shall be entitled to share in any recovery."

The respondents admit that they are unorganized individuals, never recognized as American Indians by neither the United States nor the Creek Nation, whose ancestors elected to remain east of the Mississippi River when the Creek Nation in a body removed to lands in Indian Territory. They also admit that their names are not included in the final rolls of the Creek Nation, under the laws prescribed by Congress.

It will be noticed also that said respondents allege no title independent of the Creek Nation to any lands involved in the petition of the Creek Nation, but quote and claim only under treaties executed by the United States with the Creek Nation. No treaties were ever made with said alleged band, so whatever rights it could assert are those which alone could be enforced by the Creek Nation, with whom the treaties were made.

Objections were filed to the amended motion of said alleged band before the Indian Claims Commission by the Creek Nation R. 77). The amended motion was fully argued on April 18, 1951, before the Commission (R. 86).

On June 4, 1951, the Commission entered its Order denying said respondents the right to intervene on the following grounds (R. 86-92):

1. The Creek Nation of Indians, petitioner, is an organized tribe of American Indians, recognized as such by the Secretary of the Interior, and therefore, under Section 10 of the Indian Claims Commission Act has the exclusive right to prosecute this claim (R. 90-91).

2. That respondents were not a tribe, band or other identifiable group of American Indians within the meaning of the Indian Claims Commission Act, and that said amended motion and petition did not state a common claim against the United States (R. 91).

3. That the Commission had no jurisdiction to determine which individual Indians should participate in the award

that may be made to an Indian tribe under the Indian Claims Commission Act, that being an administrative matter (R. 91).

On August 31, 1951, at the request of said Perdido Band the Indian Claims Commission entered an Order changing the name of said band to "The Creek Nation East of the Mississippi" (R. 92-96).

The respondents appealed to the Court of Claims, and on May 6, 1952, that Court rendered its decision reversing the opinion of the Indian Claims Commission, and stating in part as follows (R. 114):

> "In summary, we hold first that it was within the power of the Commission to allow the motion to intervene and that under the circumstances of this case, the motion should have been allowed. Next, we hold that the Commission erred in holding that the petitioner-appellee has the exclusive right to prosecute the claim here asserted. Although, as suggested by appellants, this decision of the Commission may have been premature; the record before the Commission and now before the court indicates, and we hold, that if there was an injury inflicted by the 1814 treaty, it was an injury to the Creek Nation as it was then constituted, and that any recovery for such injury should be for the benefit of all the descendants of that nation and not for the exclusive benefit of the organized tribe or nation in Oklahoma. And, finally, we hold that in the event of an award for such an injury, it should be for the benefit of all descendants of the Creek Nation as it was constituted in 1814, and recognized by the United States in the treaty of cession of that year, the method of determining the identity of such descendants to be provided for by Congress in making an appropriation to pay the award."

Petitioner, the Creek Nation is now requesting this Court to review the decision of the Court of Claims and correct the several errors made by that Court.

Specification of Errors to Be Urged

The Court of Claims erred in the following respects:

1. In holding that under the express terms of the Indian Claims Commission Act the Creek Nation, which throughout its dealings with the United States has been an organized tribe of American Indians recognized as such by the United States, does not have the exclusive right to prosecute this Creek tribal claim, resulting altogether from its dealings with the United States.

2. In holding that the Creek Nation lost its identity by its removal from its domain east, to a new domain in the West, and that after its removal in a body to the West it was not the same Creek Nation that it was in the East.

3. In holding that in the absence of statutory authority, or rule of the Indian Claims Commission, said Commission has authority to grant intervention.

4. In holding that respondents' ancestors—as individual members of the Creek Nation—had a vested right in Creek tribal property in 1814, when this claim arose, which would pass by inheritance to present respondents.

5. In failing to hold that respondents' ancestors abandoned their Creek tribal rights, if any they had, by failing to follow the tribe during its removal as a body in 1836 and 1837 from the east to its new domain West of the Mississippi River in Indian Territory.

6. In holding that after abandoning their Creek tribal rights, if any they had, and not thereafter being enrolled upon the final rolls of Creek citizens under the laws prescribed by Congress, said individual respondents can now participate in the distribution of an award to the Creek Nation, if any be recovered, irrespective of the plain directions of Congress that only those persons enrolled upon the final Creek rolls can participate in the distribution of the Creek tribal estate.

7. In holding that respondents can try their individual rights against the Creek Nation to participate in Creek tribal property under the Indian Claims Commission Act, which limits such suits to those of a "tribe, band or other identifiable group of American Indians" against the United States.

8. In holding that respondents are an identifiable group of American Indians presenting a common claim against the United States within the meaning of the Indian Claims Commission Act.

9. In creating an identifiable group of American Indians out of an aggregate of individual citizens of the United States, which were never organized or never before recognized by the United States as an identifiable group of American Indians.

10. In reversing the decision of the Indian Claims Commission on the above questions.

Reasons for Granting the Writ

The reasons for requesting this Court to review this case are set forth as follows:

I

The holding of the Court of Claims is contrary to the express provisions and directions of the Indian Claims Commission Act.

Section 10 of the Indian Claims Commission Act provides:

> "Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; *but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization*

shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission.'' (Italics ours).

Construing the above provision and reviewing the history of the removal of the Creek Nation from its ancestral home in the east to lands in the west, the Indian Claims Commission held that the Creek Nation throughout history was an organized tribe of American Indians, recognized as such by the Secretary of the Interior, and under said Section 10 had the exclusive right to prosecute this Creek tribal claim against the United States (R. 88-91).

The Court of claims held that the Indian Claims Commission erred in this holding (R. 114). In arriving at this conclusion the lower court stated that the Creek Nation was split by emigration, and that that portion of the Creeks who settled west of the Mississippi River in Indian Territory, formed a new tribal organization for the holding of property and management of tribal affairs in Indian Territory, and that thereafter the United States dealt with this new tribal organization of Western Creeks with respect to property and affairs of those Creeks in Indian Territory only (R. 102-103).

This conclusion is wholly contrary to the pleadings (Petition, pars. 1, 2, admitted by The United States in its Answer, p. 1; R. 1, 38), and the facts relating to the forced removal of the Creek Nation in a body from its ancestral domain in the east to lands granted to it in the Indian Territory, under the policy established by Congress by the Act of May 28, 1830, 4 Stat. 411, for the exchange of lands and the removal of the Indian tribes from the east to the west.

History shows that there was but one Creek Nation, and that it remained the same Creek Nation west of the Mississippi, that it was when located east of the Mississippi River. Throughout the whole period of its dealings with the United

States the Creek Nation was an organized tribe of American Indians, recognized as such by the United States both before its removal and after its removal *in a body* to lands west of the Mississippi River in Indian Territory.

We will briefly outline the history of the Creek Nation in order to illustrate this point.

The Creek Nation of Indians, one of the Five Civilized Tribes, was a powerful tribe of American Indians, numbering between 20,000 to 25,000 persons, formerly inhabiting a large domain comprising most of the lands now included within the States of Georgia, Alabama, and part of the State of Mississippi, when the white man first discovered this continent (Bull. 30, Bur. Amer. Eth., Pt. 1, pp. 362-363).

The first treaty executed by the United States with the Creek Nation was that of August 7, 1790 (7 Stat. 35, 2 Kapp. 25), under the terms of which the Creek Nation acknowledged itself to be under the protection of the United States, and the United States solemnly guaranteed to the Creek Nation its domain not therein ceded.

By various Treaties with the United States (June 29, 1796, 7 Stat. 56, 2 Kapp. 46; June 16, 1802, 7 Stat. 68, 2 Kapp. 58; November 14, 1805, 7 Stat. 96, 2 Kapp. 85; August 9, 1814, 7 Stat. 120, 2 Kapp. 107, the one involved in this proceeding; January 22, 1818, 7 Stat. 171, 2 Kapp. 155; January 8, 1821, 7 Stat. 215, 217, 2 Kapp. 195, 197), the Creek Nation ceded to the United States large areas of its domain, until in 1825 the Creek domain was reduced to a small area in northeastern Alabama, and western Georgia (Royce, Indian Land Cessions, Plat 1 Alabama, Cession 172; Plat 15, Georgia, Cessions 127, 131, 141).

With the development of the white settlements in this area, the United States sought to induce the Creek Nation to leave its ancestral home and move west of the Mississippi River, to lands in Indian Territory. Many inducements were held out to the Creek Nation to cede its lands east and

exchange them for lands in the west (Creek Nation v. United States, 77 C. Cls. 226).

In 1825 the United States commissioners induced General William McIntosh, Principal Chief of the Lower Creeks, to execute the Treaty of February 12, 1825 with the United States (7 Stat. 237; 2 Kapp. 214), providing for the cession of all Creek lands east and for the removal of the Creek Nation west of the Mississippi River, upon lands to be set aside for it in Indian Territory. Because this treaty was not executed with the consent of the Creek Council, General McIntosh was put to death (The Road to Disappearance, by Angie Debo, Univ. of Okla. Press, 1941, pp. 87-91).

Under the terms of the Treaty of January 24, 1826 (7 Stat. 286, 2 Kapp. 264), between the Creek Nation and the United States, the Treaty of February 12, 1825 was repudiated (Art. 1), and the Creek Nation ceded to the United States its remaining lands in Georgia (Art. 2). *One of the considerations to the Creek Nation for the cession was the promise of the United States (Art. 6) to purchase a new territory west of the Mississippi River, as a future home of such of the tribe as might wish to emigrate there* (*Creek Nation* v. *United States*, 77 C. Cls. 226, Finding III). The treaty further provided for the removal of the friends and followers of General McIntosh to lands in Indian Territory (Arts. 6-10). In about 1828 the friends and followers of General McIntosh emigrated to the west, and became the first of the Creeks to settle on Creek lands in Indian Territory. By 1830, 3,000 Creeks were living in Indian Territory (A Guide to the Indian Tribes of Oklahoma, by Muriel H. Wright, Univ. of Okla. Press, 1951, p. 134).

The main body of the Creek Nation remained east of the Misissippi River on its lands in eastern Alabama, and the United States continued its efforts to induce them to emigrate to the west.

By the Treaty of March 24, 1832 (7 Stat. 366, 2 Kapp. 341), the Creek Nation ceded to the United States all of its lands east of the Mississippi River (Art. 1). The treaty further provided that the individual Creeks—chiefs and heads of families—receive allotments of land within the ceded area in Alabama, which after the period of five years were to be conveyed in fee simple to the individual Creek allottees who desired to remain thereon (Arts. II, IV). The United States agreed to keep white intruders from the ceded area for five years, or until the individual Creeks had selected their allotments (Art. V). The individual Creeks had the right to sell their allotments, and move to lands set aside for the Creek Nation west of the Mississippi River in Indian Territory (Art. III). The treaty further provided:

> "Article XII. The United States are desirous that the Creeks should remove to the country west of the Mississippi, and join their countrymen there; and for this purpose it is agreed, that as fast as the Creeks are prepared to emigrate, they shall be removed at the expense of the United States, and shall receive subsistence while upon the journey, and for one year after their arrival at their new homes—Provided however, that this article shall not be construed so as to compel any Creek Indian to emigrate, but they shall be free to go or stay, as they please.
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> • • • • • • •
>
> "Article XIV. The Creek country west of the Mississippi shall be solemnly guaranteed to the Creek Indians, nor shall any State or Territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them. And the United States will also defend them from the unjust hostilities of other Indians, and will also as soon as the boundaries of the Creek country West of the Mississippi

> are ascertained, cause a patent or grant to be executed to the Creek tribe; agreeably to the 3d section of the act of Congress of May 2d [28,] 1830, entitled 'An act to provide for an exchange of lands with the Indians residing in any of the States, or Territories, and for their removal West of the Mississippi.''

Although Article XII of the treaty provided that the individual Creek Indians were free to emigrate to the west or stay in Alabama as they pleased this provision became ineffective, and the events that followed the execution of the treaty, show that the United States forced the *whole* Creek Nation to emigrate to the west.

To pave the way for the ultimate removal of the whole Creek Nation to the west, and to establish the boundaries of the permanent home for the whole Creek Nation in Indian Territory, the United States executed the Treaty of February 14, 1833 (7 Stat. 417; 2 Kapp. 388) with that portion of the Creek Nation then west of the Mississippi (the McIntosh Party).

Article II of the treaty defined the Creek domain. Articles III and IV provided:

> "Art. III. The United States will grant a patent, in fee simple, to the Creek Nation of Indians for the land assigned said nation by this treaty or convention, whenever the same shall have been ratified by the President and the Senate of the United States—and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned them.
>
> "Art. IV. It is hereby mutually understood and agreed between the parties to this treaty, that the land assigned to the Muskogee Indians, by the second article thereof, shall be taken and considered the property of the whole Muskogee or Creek Nation, as well of those now residing upon the land, as the great body of said nation who still remain on the east side of the Missis-

sippi: and it is also understood and agreed that the Seminole Indians of Florida, whose removal to this country is provided for by their treaty with the U. S. dated May 9th, 1832, shall also have a permanent and comfortable home on the lands hereby set apart as the country of the Creek nation: and they (the Seminoles) will hereafter be considered a constituent part of said nation, but are to be located on some part of the Creek country by themselves—which location will be selected for them by the commissioners who have signed these articles of agreement or convention."

The Court of Claims had occasion to review the history of the Treaty of 1832 and the removal of the whole Creek tribe to the west in the case of *The Creek Nation* v. *United States*, 77 C. Cls. 226. This court found that it was impossible for the United States to keep out intruders from Creek lands, and that the whites flocked into the ceded area as soon as the Treaty of 1832 was executed, making it impossible for the United States to carry out the terms of the Treaty.

In its finding XIII the Court found the following facts:

"During the spring of 1836 Indian depredations became prevalent throughout a large part of the territory ceded to the United States in the treaty of 1832. The Governors of Alabama and Georgia called out the State militia, and the President sent General Thomas Jesup with a contingent of Federal troops to suppress the Indian hostilities. A majority of the Creeks remained friendly and took no part in the hostilities against the whites, but the depredations committed by those unfriendly were so extensive and the difficulty of restoring and maintaining law and order so great, that the Federal Government decided it was necessary to remove the whole Nation to its country west of the Mississippi River, and with the exception of about 600 Creek warriors who had enlisted in the Federal service against the Seminoles, and the families of such warriors, the whole tribe, under a military escort, was removed during the

summer and fall of 1836. These warriors and their families were removed to the West after the termination of Seminole hostilities in 1837."

The Report of the Commissioner of Indian Affairs, dated December 1, 1836, confirms the Court's finding, and states in part as follows (Sen. Docs., Vol. 1, 24th Cong., 2 Sess., Cong. Ser. 297, p. 381):

> "The removal of the Creek Indians, like that of the Seminoles, was made a military operation on the commission by them of hostile acts. The causes of these, and the measures adopted to repress and prevent them, as far as they were then ascertained, were communicated to Congress in the answer from this department to the resolution of the House of Representatives of the 3d of June, 1836. The operations of the army since that time have effected the subjugation of the Creeks. Under a contract, a copy of which is submitted, marked C, all of them have been removed, with the exception of the families of a band of 700 warriors, who have been mustered into the service, to act in concert with the troops of the United States in Florida, against the Seminoles."

In the Report of the Commissioner of Indian Affairs, dated December 1, 1837, is the report of the Acting Superintendent of the Western Territory (Indian Territory), which states in part as follows (Sen. Docs., 25th Cong., 2 Sess., 1837-38, Cong. Ser. 314, pp. 538-539):

> "No very essential changes have taken place within this superintendency since my last report, except the increased number of Indians, caused by the emigation of the greater part of the Creeks, and the partial removal of the Cherokees and Chickasaws.
>
> "The present population of the Creeks may be estimated, including new and old settlers, at between eighteen and twenty thousand persons; * * *"

In Bulletin 30, Bureau of American Ethnology, Pt. 1, pp. 362-363 (Handbook of American Indians), in the article dealing with the Creeks, it is stated:

> "• • • During early historic times the Creeks occupied the greater portion of Alabama and Georgia, residing chiefly on Coosa and Tallapoosa rs., the two largest tributaries of Alabama r., and on Flint and Chattahoochee rs. • • •
>
> "For more than a century before their removal to the W., between 1836 and 1840, the people of the Creek confederacy occupied some 50 towns, • • • Geographically the towns were grouped as Upper Creek, on Coosa and Tallapoosa rs., Ala., and Lower Creek, on middle or Lower Chattahochee r., on the Alabama-Georgia border. • • •"

Thus in 1836 and 1837 the whole Creek Nation or tribe was moved west of the Mississippi River upon lands granted to them there. There were a few Creeks who elected to remain east, but there were very few indeed.

As the Commissioner of Indian Affairs reported on November 30, 1848, H. Ex. Docs., Vol. 3, Pt. 2, (1848-50), 31st Cong., 1 Sess., Cong. Ser. 570, p. 948:

> "Within the last year, forty-four of the *few Creek Indians remaining in Alabama,* and five hundred and forty seven Choctaws from the State of Mississippi, have removed to the country of their brethren west, leaving about two thousand five hundred of the latter people still east of the Mississippi river, notwithstanding the great exertions and the large expenditures that have been made for some years past in endeavoring to effect their emigration. These Indians were made citizens by the laws of the States where they are, and the effort to remove them was an obligation voluntarily assumed by the government for the benefit and the advantage of those States. New arrangements have been adopted for a final effort to effect that object, which it is hoped will be attended with success. All that

> can be induced to go will probably be removed within another year, at the end of which all further proceedings and expenses should be terminated, and those that shall then remain be permitted to do so in the quiet enjoyment of their rights as citizens." (Italics ours).

Nor was the government of the Creek Nation a new government after its removal in a body to the West, as was held by the Court of Claims (R. 102). While it is true that the Chiefs of the McIntosh party—the first emigrants—set up a government for the early emigrants, and that the Treaty of February 14, 1833 was executed by the United States with the Chiefs of this party, yet this government was temporary in duration, and went out of existence when the whole Creek tribe was removed to the West. In 1836 the United States moved the main body of the Creek Nation to the West under military escort, and upon the settlement of the Creek Nation as a whole in Indian Territory, the old laws and government of the Creek Nation were extended over the whole Creek Nation in the West.

From the year 1799 the Creek Nation had adopted a national form of Government. This government is described in "The Road to Disappearance" by Angie Debo (Univ. of Okla. Press, 1941), pp. 67-68, as follows:

> "While this experience was fresh in the minds of the Indians, Hawkins called a council of the chiefs at Tuckabatchee and persuaded them to adopt a new plan of government. The Upper Towns were divided into eight groups, and one man (in some cases two men) was selected from each group to superintend the execution of the law in that division. The distinctive functions of Peace and War towns were abolished; 'towns of the same fire' were grouped together, but it was 'unanimously agreed that the E-tall-wau, white towns, should be classed as warriors' in their relation to the Confederacy. The same council adopted the principle that when a man was put to death according to law, it was

the law that killed him, and no man or family was to be held accountable. It was decided that white 'mischief-makers' in the Indian country were under the authority of the agent, who might bring in soldiers or call out Creek warriors to arrest them.

"With the law enforcement under his control Hawkins also labored to bring the council under subjection. Once a year he invited each town to send a deputation of not more than five or six members to comprise the National Council. At this meeting he reported the state of the nation, recommended legislation, and applied for compensation and satisfaction for depredations on the frontier. The Council elected a speaker—using the term in a new sense—to preside over the deliberations. This official was recognized as the head chief, and it was still customary for him to employ a 'speaker' or orator to make announcements and express his sentiments to the assembly. Efa Harjo was elected to the new office, and Tuckabatchee thus became the meeting place of the Council. Hawkins hoped to centralize the government at the expense of the town and the clan in order to 'civilize' the Creeks 'and give the United States a more commanding influence over them.' He eventually brought the Lower Creeks into his organization. Each division had its own council and speaker, but there was a head chief, or speaker, of the nation, whose town became the seat of the united council."

After the Creeks as a body settled in the west they again set up their government over the new domain. This government was the same as they had in the east. In "A Guide to the Indian Tribes of Oklahoma" by Muriel H. Wright (Univ. of Okla. Press, 1951) pp. 135-136, this government is described as follows:

"The Upper and the Lower Creek divisions were nominally reunited in the government of the Creek Nation, West, in 1839 (or 1840), though they remained aloof from each other until after the Civil War, except for meetings of the General Council. There was a

principal and a second chief for each of the two divisions, and every one of the towns had a principal chief and a second chief. The principal chiefs of the towns, referred to in English as 'kings', together with the two principal chiefs of the nation, were elected for life and composed the annual General Council, in which the two chiefs sat side by side, though Roley McIntosh was the admitted leader by seniority while he held office. Each of the two divisions also had a council. The Lower Creek had two lighthorsemen who served in the capacity of sheriffs. The Upper Creek elected four councilors, one of whom was the principal chief. A group of officers, called 'lawyers', in each of the towns and numbering from four to forty-five according to population, administered the laws made by the General Council and approved by the two principal chiefs. Written laws of the nation, compiled before the removal in 1826, the earliest of which was dated 1817, were approved by the General Council, West, in 1840. * * *"

In the Report of the Commissioner of Indian Affairs, dated November 25, 1838, is the report of William Armstrong, Acting Superintendent of Western Territory, in which he states with respect to the Creek Nation in its new location in the west (Sen. Docs., Vol. 1, 1838-'39, 25th Cong., 3 Sess., Cong. Ser. 338, p. 512):

"* * * The nation is divided into what is called upper and lower towns, as it was before their removal. McIntosh is the chief of the lower town and Apothleyoholo of the upper town. The parties are nearly equally divided. The Creeks have not, like the Choctaws or Cherokees, formed a constitution and laws, except such as are passed by the chiefs in council. I have no doubt but in a few years they will do so."

In the Report of the Commissioner of Indian Affairs, dated November 25, 1839, is the Report of the Acting Superintendent of Western Territory, in which the Creek govern-

ment in the west is described as follows (Sen. Docs., Vol. 1, 26th Cong., 1st Sess., Cong. Ser. 354, p. 471):

> "* * * They are divided into what is called upper and lower towns; this distinction has existed for many years. Apothleyoholo is the chief of the upper, and Roly McIntosh of the lower. To these two chiefs all the towns adhere, each having a chief, who, with the principal chief, hold councils and pass laws for the government of the nation. They have no written constitution, but reduce generally to writing their laws. * * *"

After the removal of the whole Creek Nation to the West, and the extension of the old Creek government over the Creek domain in the West, the United States executed all treaties and agreements solely with the Creek Nation in its new location in Indian Territory (Treaties of January 4, 1845, 9 Stat. 821, 2 Kapp. 550; August 7, 1856, 11 Stat. 699, 2 Kapp. 756; June 14, 1866, 14 Stat. 785, 2 Kapp. 931; Agreement of March 1, 1889, 25 Stat. 757, 759; the Original Creek Agreement, approved March 1, 1901, 31 Stat. 861; and the Supplemental Creek Agreement, approved by Act of June 30, 1902, 32 Stat. 500).

The first treaty executed by the United States with the Creek Nation after its removal in a body to the West, signed at the Creek Agency in Indian Territory on January 4, 1845, evidences the fact that it was made with the *united* Creek Nation in the West, for the names of the Chiefs of the early emigrants (Roly McIntosh, et al.), and the names of the Chiefs of the main body of the Creek Nation removed in 1836 (O-poeth-le Yoholo, et al.), are affixed to it (9 Stat. 821, 2 Kapp. 550, 552).

Furthermore, by Article 5 of the Treaty of August 7, 1856, 11 Stat. 699, 2 Kapp. 756, the Creek Nation then located west of the Mississippi River, reserved to itself all annuities due the Creek Nation from the United States

under the Creek Treaties of August 7, 1790, June 16, 1802, January 24, 1826, March 24, 1832, theretofore executed by the United States with the Creek Nation east of the Mississippi, and under the Creek Treaties of February 14, 1833, and January 4, 1845, executed by the United States with the Creek Nation in its new location west of the Mississippi. Article 7 provided that all annuities in money due the Creek Nation under these former treaties, shall be paid to the Treasurer of the Creek Nation, whenever the general council shall so direct. So in this treaty the Creek Nation then in the West dealt with Creek matters that arose while it was located in the East, as well as matters affecting the tribe in the West, the holding of the Court of Claims notwithstanding (R. 102-103).

Thus it is clearly evident, contrary to the holding of the Court of Claims, that the United States recognized the Creek Nation in the West as the same body politic that it was in its old location in the East.

As the Indian Claims Commission clearly states in its opinion (R. 90):

> "The 1826 treaty did not, at least by its terms, contemplate a removal of the entire tribe west, but the 1832 treaty discloses a purpose to recognize those who migrated to the west as the main governing body of the tribe since provision was made for enabling individual chiefs and heads of families wishing to do so to remain east and select tracts in their aboriginal land which was reserved for that purpose in said treaty of 1832. This purpose was confirmed by the treaty of 1833, which was made with the Creek Nation at Fort Gibson in Indian Territory, and in which the territory ceded by the United States was assigned to the whole Muskogee or Creek Nation—those residing east and those residing west of the Mississippi. Thereafter, all dealings of the Federal Government were made with the Creeks in Oklahoma, and we find no treaties, contracts or other

> transactions with those members of the tribe who remained east, or that defendant ever recognized those remaining east as the Creek Nation."

We believe this to be an accurate statement of the facts, as above set forth in detail.

In 1858 or 1859 the Creek Nation adopted a short written constitution and undertook to make their tribal officers elective (The Road to Disappearance, Angie Debo, p. 124). This form of government continued until much of its power over Creek property and affairs, was stripped from it under the Curtis Act, June 28, 1898, 30 Stat. 495, and subsequent legislation.

Section 28 of the Act of April 26, 1906, 34 Stat. 137, provided in part as follows:

> "That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, * * *"

The present government of the Creek Nation consists of an elected Principal Chief holding his commission from the President of the United States, and a Creek tribal council, and this government is recognized as representative of the Creek Nation by the Secretary of the Interior. The Creek Nation as thus constituted is the petitioner herein (R. 1). This is admitted in the Answer of the United States (R. 38).

We submit that the Court of Claims has disregarded these historical facts: That there was but one Creek Nation throughout the history of its dealings with the United States; that it has been recognized as an organized tribe of American Indians from 1790 to date; that by its removal in a body to Oklahoma in 1836 and 1837 it did not lose its former tribal identity as the Creek Nation; that after its removal west the United States continued to recognize it as

the same Creek Nation by executing all treaties and agreements with it and paying all Creek annuities to it, due the Creek Nation under treaties executed with it east and west of the Mississippi; and that the Creek Nation is the only entity who could present this Creek tribal claim for settlement under the Indian Claims Commission Act.

The Creek Nation from its location in the West has continued to prosecute this claim against the United States. In 1853 and thereafter Creek delegates from Indian Territory were sent to Washington and memorialized Congress for a just settlement of this claim (Repts. Comr. Ind. Affs., 1851, p. 124; 1853, p. 149; 1855, p. 134; R. 8, 15-37). The Creek Nation was unsuccessful in its attempts to secure a settlement of this claim in litigation before the Court of Claims in 1926 and 1931. *The Creek Nation* v. *The United States,* 63 C. Cls. 270, certiorari denied 274 U. S. 751; and 74 C. Cls. 663 (R. 9).

Section 10 of the Indian Claims Commission Act is consistent with the decisions of this Court holding that the *tribe* is the proper party to prosecute a tribal claim. As the Court of Claims held in *The Cherokee Nation* v. *United States,* 40 C. Cls. 252, 328:

> "• • • This, too, is consonant with the usage of nations. The claims of individuals against a foreign power are always presented, not by them individually, but by their Government. The claims are pressed as international, but the money received is received in trust, to be paid over to the persons entitled to it."

In affirming this holding this Court, in 202 U. S. 101, 130, said:

> "• • • The Cherokee Nation, as such, had no interest in the claim, but officially represented the Eastern Cherokees."

• • • • • • •

"We concur with the Court of Claims in the wisdom of rendering judgment in favor of the Cherokee Nation, subject to the limitation that the amount thereof should be paid to the Secretary of the Interior, to be distributed directly to the parties entitled to it, * * *."

See also 225 U. S. 572, 575-580 to the same effect.

Clearly the Court of Claims erred in its holding that the Creek Nation has not the exclusive right to prosecute this claim under the Indian Claims Commission Act, and the Indian Claims Commission was correct in its holding that the Creek Nation had such exclusive right.

II

The decision of the Court of Claims is contrary to the established law and the decisions of this Court.

a. It is well established that there can be no intervention without statutory authority.

The Indian Claims Commission denied the intervention (R. 86-87).

The Court of Claims stated (R. 112, 114):

"* * * As a matter of justice, and to bring about a thorough administration of the law laid down by the Indian Claims Commission Act, we think that where all interested persons have not been made parties to the proceeding by joining in the original petition, the Commission has full power to allow such persons, constituting an identifiable group of Indians such as we have here, to intervene or be made parties regardless of the lack of specific language to that effect in the Act, or the failure of the Commission to formulate rules relating to intervention."

* * * * * * *

"In summary, we hold first that it was within the power of the Commission to allow the motion to inter-

vene and that under the circumstances of this case, the motion should have been allowed. * * *"

The Court has overlooked the principle that there can be no intervention without statutory authority.

It is a well settled principle that there can be no intervention without statutory authority. In 123 Am. St. Repts., p. 281, it is stated:

> "Intervention was borrowed from the civil law, and while employed in the English ecclesiastical courts to some extent, it was unknown to the common law and also to the practice in equity: * * * and where permitted, it is controlled by statute and not be allowed in cases other than those therein prescribed: * * * Nothing appears clearer than that, in the absence of some statute authorizing it, there can, strictly speaking, be no intervention in a suit in equity: Drake v. Goodrich, 6 Blatchf. 151; Fed. Case No. 4062; Anderson v. Jacksonville R. R. Co., 2 Woods, 628, Fed. Case No. 358; Shields v. Barrow, 17 How. 130, 15 L. Ed. 158; * * *"

And at page 296, it is further stated:

> "Unless some statute has authorized it there can be no intervention in an action at law: Springfield F. & M. Ins. Co. v. Richmond & D. R. Co., 48 Fed. 360; * * *"

The Indian Claims Commission is not a court of general jurisdiction, but was created by statute for a specific and limited purpose. Its powers are governed entirely by the Indian Claims Commission Act, approved by Congress on August 13, 1946 (60 Stat. 1049). Therefore, the Commission can exercise no powers other than those expressly and clearly set forth in that act. Nowhere in this act did Congress authorize the Commission to permit a party to intervene in a suit filed by an Indian tribe, band or other identifiable group of American Indians.

Undoubtedly the reason Congress did not provide for intervention was to avoid just such a situation as has arisen here. By limiting the jurisdiction of the Indian Claims Commission to claims by recognized tribes, bands, or other identifiable groups of American Indians, Congress sought to avoid disputes which would delay the speedy and final settlement of claims against the United States; and if such issues were permitted to be settled the time of the Commission and the Courts would be so taken with such matters that the work of the Commission could not possibly be completed in the ten year limitation fixed in the Indian Claims Commission Act.

Section 9 of the Indian Claims Commission Act provides that:

> "The Commission shall have power to establish its own rule of procedure."

The rules promulgated by the Commission do not provide for intervention.

Therefore, there exists no authority by statute or rule of the Commission for the proposed action, and in the absence of any statutory right, or any rule of the Commission, it has no power to grant the intervention requested by Respondents.

Furthermore, this Court has held that in courts of general jurisdiction wherein intervention is permitted by rule of court, an order denying intervention is not an appealable order. *Ex Parte Cutting,* 94 U. S. 15; *Credits Commutation Co.* v. *United States,* 177 U. S. 311; *Re Leaf Tobacco Bd. of Trade,* 222 U. S. 578, 581; *Re Engelhard & Sons Co.,* 231 U. S. 646; *New York* v. *Consolidated Gas Co.,* 253 U. S. 219; *New York* v. *N. Y. Telegraph Co.,* 261 U. S. 312; *Allen Calculators* v. *National Cash Register Co. and The United States,* 322 U. S. 137-143.

b. This Court has held that an individual Indian of a tribe has no vested rights in tribal property in the absence of statute or treaty granting them such right.

Let us point out to the Court that in 1814 the Creek Nation was a body politic; its membership was not definitely fixed, but was constantly changing by death, birth, adoption and abandonment. Its membership was not a fixed or closed class such as the decision of the Court of Claims seems to suggest (R. 104-105).

The Court of Claims has held in effect that the individual members of the Creek Nation in 1814 had a vested right in the Creek tribal property (R. 104-105). This holding is contrary to the well established principle that so long as property is *tribal* in character the individual Indian has no vested interest in it.

In discussing the rights of individual Indians in the tribal estate in *Western Cherokees* v. *United States,* 27 C. Cls. 1, 53, the Court said:

> "The lands east of the Mississippi were not vested in the Cherokee government, as distinguished from the Cherokee people. Their chiefs in council, have sold or disposed of them, but under their constitution and laws could not have brought an action of trespass or ejectment against one of their own citizens for dwelling upon or hunting over the lands. The title was not vested in the Cherokees as individuals. They were neither tenants in common nor joint tenants. The individual Cherokee has no vested right which he could convey or devise or make the subject of a suit in partition. If he withdrew from the community he left all rights behind him, and if a stranger was admitted he acquired a right by virtue of his admission alone. The property was communal—a property wherein every person, not as an individual, but as a member of the community, held an equal, indistinguishable, indivisible right of user, and nothing more."

In outlining the rights of individual Indians as against the tribal estate, Cohen's Handbook of Federal Indian Law, pp. 183-184, states:

> "* * * His interest in the tribal property is personal and cannot be transferred or inherited, but his heirs, if they are members of the tribe, will participate in the tribal property in their own right.
>
> "Observing that the Cherokee lands were held in communal ownership, the Supreme Court, speaking in the case of The Cherokee Trust Funds remarks:
>
> > '* * * that does not mean that each member had such an interest, as a tenant in common, that he could claim a pro rata proportion of the proceeds of sales made of any part of them. (P. 308.)'
>
> "In the absence of legislation to the contrary, the individual Indian has no right as against the tribe to any specific part of the tribal property. It is often said that the individual has only a 'prospective right' to future income from tribal property in which he has no present interest. Other terms used to picture this right are 'an inchoate interest,' and a 'float.' These terms aptly characterize the intangible right of the Indian to share in tribal property. Until the property loses its tribal character and becomes individualized, his right can be no more than this, except insofar as federal law, tribal law, or tribal custom may give him a more definite right of occupancy in a particular tract. In the case of tribal funds, he has, ordinarily, no vested right in them until they have been paid over to him or have been set over to his credit, perhaps subject to certain restrictions. In the case of lands, he has no vested right unless the land or some designated interest therein has been set aside for him either severally or as tenant in common.
>
> "The statement has often been made that the tribe holds its property in trust for its members. This statement may be compared with the assertion frequently made that corporate property is held in trust for the

stockholders, though, strictly speaking, no technical trust relationship exists in either case.

"In speaking of the title to the lands of the Creek Nation, the court in Shulthis v. McDougal, declared:

> 'The tribal lands belonged to the tribe. The legal title stood in the tribe as a political society; but those lands were not held by the tribe as the public lands of the United States are held by the nation. They constituted the home or seat of the tribe. Every member, by virtue of his membership in the tribe, was entitled to dwell upon and share in the tribal property. It was granted to the tribe by the federal government not only as the home of the tribe, but as a home for each of the members.' "

And at p. 185 Cohen further states:

> "Originally the only requisite to share in tribal property was membership. Abandonment or loss of membership forfeited the right to share. Acquisition of membership ordinarily carried with it the right to share in tribal property. The question of what constitutes tribal membership is discussed elsewhere.
>
> "Under the rule that membership was necessary to share in tribal property, the right to participate in the distribution could not pass to the member's heirs, nor could it be assigned by the member. The children of a member could not inherit their parent's right to share. Their only right to share in the distribution of tribal property came from being members themselves. * * *"

Therefore, Respondents' ancestors had no vested interest or right in Creek tribal property, which could be handed down to Respondents.

In *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, 307, the Supreme Court stated:

> "Whatever title the Indians have is in the tribe and not in the individuals, although held by the tribe for the common use and equal benefit of all the members. (The

Cherokee Trust Funds, 117 U. S., 288, 308). The manner in which this land is held is described in Cherokee Nation v. Journeycake (155 U. S. 196, 207), where this court, referring to the treaties and the patent mentioned in the bill of complaint herein, said:

> 'Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent, whatever of title was conveyed, was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees, or any of them.' "

The Court of Claims quotes as the sole authority for its holding that respondents are entitled to share in an award, if any in this case, the decision in *The Cherokee Nation* v. *United States,* 40 C. Cls. 252, affirmed by this Court in 202 U. S. 101. This case is consistent with the rule contended for by petitioner herein, which is that individual Indians have no vested rights in tribal property which can pass to their heirs, in the absence of statute or treaty giving them such rights. In the *Cherokee* case, a Cherokee treaty specifically directed the per capita distribution of the proceeds of the sales of tribal lands to the Eastern Cherokees as well as to the Western Cherokees, and the jurisdictional act in that case specifically directed the Court to apportion the judgment money to those Cherokees to whom the money equitably belonged. Therefore, in this case the individual Cherokee Indians, whether located East or West of the Mississippi, were by the treaty terms vested with an individual per capita interest in the fund in question. The treaty had changed the character of the fund from tribal to individual property.

No such treaty is present in the case now before us; nor does the Indian Claims Commission Act direct the Commission to divide the judgment money per capita to any indi-

viduals of a "tribe, band or other identifiable group of American Indians".

In fact, the *Cherokee* case quotes with approval that part of the decision of the *Western Cherokee Case*, 27 C. Cls. 1, 53, holding that the individual Indian has no vested interest in tribal property so long as it remains tribal in character (40 C. Cls. 252, 326).

Respondents can point to no Creek treaty granting them vested individual rights in Creek lands or funds, and there is none. The claim herein presented is *tribal* in character, and no individual Creek Indian has any vested interest in it. Had this claim been presented in 1814, the judgment, if any recovered, would have been set up on the books of the United States Treasury to the credit of the Creek Nation of Indians, until Congress in its plenary power over Indian affairs directed the disposition of it. Congress could have directed the fund to be disbursed for purposes for the general advancement of the Creek Nation, instead of per capita to the members of the tribe.

Clearly the Court of Claims has misconstrued the holding in the above *Cherokee* case, and has applied it to a situation to which it has no proper application, and we submit that in this that Court erred.

c. This Court has held in a similar case that individual Indians who abandon their tribe and elect to remain east of the Mississippi, while the main body of the tribe has moved to lands west of the Mississippi, lose their rights in the property of the tribe. The decision of the Court of Claims has overlooked this applicable principle.

It is well settled that individual Indians who abandon their tribe and elect to remain east of the Mississippi while the whole tribe has moved to lands west of the Mississippi, lose their rights in the property of the tribe.

The situation before us is very similar to that in the *Eastern Band of Cherokee Indians* v. *United States and Chero-*

kee Nation, 20 C. Cls. 449, affirmed by this Court in 117 U. S. 288. In that case the main branch of the Cherokee Nation had moved west of the Mississippi River, and some Cherokee Indians, later designated as the Eastern Band of Cherokees, remained in North Carolina. The band sued under a special jurisdictional act for a share in the trust funds held by the United States for the Cherokee Nation.

In affirming the decision of the Court of Claims denying recovery, this Court said (117 U. S. 288, 293, 309, 310, 311):

> "Whatever rights, therefore, the Cherokees in North Carolina, who refused to join their countrymen in the removal to the lands ceded to them west of the Mississippi, can claim in the funds arising from sales of portions of such lands, or in the fund created by a commutation of the annuities granted upon cessions of the lands of the Cherokee Nation, must depend entirely upon the treaties out of which those funds originated. They have as yet received nothing from either of them, and they can claim nothing by virtue of this fact that the lands of the Nation, which its authorities ceded to the United States, were held for the common benefit of all the Cherokees. *All public property of a nation is supposed to be held for the common benefit of its people; their individual interest is not separable from that of the Nation.*
>
> "The Cherokees in North Carolina dissolved their connection with their Nation when they refused to accompany the body of it on its removal; and they have had no separate political organization since. Whatever union they have had among themselves had been merely a social or business one. It was formed in 1868, at the suggestion of an officer of the Indian Office, for the purpose of enabling them to transact business with the Government with greater convenience. Although its articles are drawn in the form of a constitution for a separate civil government, they have never been recognized as a separate Nation by the United States; no treaty has been made with them; they can pass no laws;

they are citizens of that state and bound by its laws. As well observed by the Court of Claims, in its exhaustive opinion, they have been in some matters fostered and encouraged by the United States, but never recognized as a Nation or in part. 20 C. Cl. 449-483."

"Nor is the band, organized as it now is, the successor of any organization recognized by any treaty or law of the United States. Individual Indians who refused to remove west, and preferred to remain and become citizens of the States in which they reside, were promised certain moneys, but there is no evidence that the petitioners have succeeded to any of their rights. * * *"

"* * * *If Indians in that State, or in any other State east of the Mississippi, wish to enjoy the benefits of the common property of the Cherokee Nation, in whatever form it may exist they must, as held by the Court of Claims, comply with the constitution and laws of the Cherokee Nation and be readmitted to citizenship as there provided. They cannot live out of its Territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the Nation.* Those funds and that property were dedicated by the constitution of the Cherokees, and were intended by the treaties with the United States for the benefit of the united Nation, and not in any respect for those who had separated from it and became aliens to their Nation. We see no just ground on which the claim of the petitioners can rest to share in either of the funds held by the United States in trust for the Cherokee Nation; and the decree of the Court of Claims must, therefore, be affirmed." (Italics ours.)

Under the decision in this case Respondents could not possibly assert any claim to tribal lands formerly owned by the Creek Nation. The Creek Nation alone could do so. Therefore, Respondents can have no possible interest in the Creek tribal lands which constitute the subject matter of this suit.

There were two funds involved in the above case: one

arising under the Cherokee Treaty of 1835 from the commutation of annuities due the Cherokee Nation as part of the consideration for the sale of Cherokee lands east of the Mississippi River, and one fund arising from the sale of lands in the west. The court's decision made no distinction as to the funds, and the holding applied to both funds.

The Court of Claims stated that under the Act of February 8, 1887, 24 Stat. 388, and the amendatory Act of May 8, 1906, 34 Stat. 182, Congress provided for the granting of United States citizenship to Indians who left their tribes, and guaranteed the existing rights to tribal or other property of all Indians including those who had theretofore left their tribes (R. 103). The Act of February 8, 1887 was a general allotment act, and applied only to the "Wild Tribes". This Act (Section 8), expressly excepted the Five Civilized Tribes from its operation, and this Court has held that this Act did not apply to the Creek Nation. *Porter* v. *Wilson,* 239 U. S. 170, 174-175.

The members of the Five Civilized Tribes were made citizens of the United States under the provisions of Section 15 of the Act of March 3, 1893, 27 Stat. 645, and these tribes had entirely different laws which applied specifically to them. Cohen's Handbook of Federal Indian Law, p. 425.

Clearly the Court of Claims erred in failing to consider the fact that respondents' ancestors long ago abandoned any rights they may have had as Creek Indians, by refusing to follow the Creek Nation to the west and assume the burdens of the forced removal with those Creeks who suffered these burdens, and respondents cannot now justly claim the right to share in Creek tribal assets under the above decision of this Court.*

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* During the "Trail of Tears", as the Creeks describe their forced removal, many were chained and handcuffed, and most of them walked overland from Alabama to Indian Territory under a military escort. Hundreds died and were hurriedly buried on the way. Within a short period

d. The decision of the Court of Claims disregards the enrollment laws of the Creek Nation laid down by Congress for Creeks in Oklahoma and elsewhere.

Under Article XIV of the Creek Treaty of March 24, 1832 (7 Stat. 366, 2 Kapp. 341) the United States guaranteed to the Creek Nation the right of self government within its domain in Indian Territory. Upon its removal to the west the government of the Creek Nation continued to function just as it did in the east.

The Creek Nation had its own citizenship rolls, and laws governing enrollment. The laws governing doubtful citizenship provided as follows (Constitution and Laws of the Muskogee Nation, L. C. Perryman, 1890, p. 63):

> "Section 1. All persons having resided out of the limits of the Muskogee Nation, and whose rights as citizens of the same may seem to be questionable in consequence of intermarriage with non-citizens, shall be bona fide citizens of this Nation, provided they can prove to the satisfaction of the proper authorities, that they are of Muskogee descent, and not further removed than the fourth degree.
>
> • • • • • • •
>
> "Section 3. Any person claiming citizenship under these provisions, shall, in order to establish his or her rights, prove the same by a responsible and disinterested native witness before the [Creek] District Court."

As this country developed westward the lands in Indian Territory owned by the Five Civilized Tribes (which had all been removed from the east to the west) were again surrounded by white settlements, and efforts were made to open the surplus Indian lands to white homesteaders.

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after their arrival in the west fully 3,500 emigrants died as the result of exposure or from the fevers prevalent in the new country. (A Guide to the Indian Tribes of Okla., by Muriel H. Wright, Univ. of Okla. Press, 1951, p. 135).

The consent of the Five Civilized Tribes was necessary to accomplish this purpose.

Accordingly, under Section 16 of the Act of March 3, 1893, 27 Stat. 645, Congress created the Dawes Commission to negotiate with the Five Civilized Tribes for the extinguishment of their tribal title, the allotment of their lands in severalty, the sale of the surplus lands, and the division of the proceeds and other moneys of the tribe among the members thereof; in order to enable the ultimate creation of a State of the Union which would embrace the lands in Indian Territory.

By Act of June 10, 1896, 29 Stat. 339, the Dawes Commission was given quasi-judicial powers to hear and determine applications for enrollment to citizenship in the Five Civilized Tribes, with the right of appeal to the United States District Court by the tribe or person aggrieved by the decision. This Act further provided:

> "• • • That in determining all such applications said commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes: And Provided, further, That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this Act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.
>
> "• • • and the rolls so prepared by them shall be hereafter held and considered to be the true and cor-

rect rolls of persons entitled to the rights of citizenship in said several tribes; * * *"

"That the said commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this Act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States courts, as provided herein."

By Section 21 of the Act of June 28, 1898, 30 Stat. 495, after directing the Dawes Commission to make a roll of Cherokee Citizens, Congress further directed:

"Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes.

* * * * * * *

"No person shall be enrolled who has not heretofore removed to and in good faith settled in the nation in which he claims citizenship: * * *"* (Italics ours.)

* * * * * * *

"The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

The Original Creek Agreement between the United States and the Muscogee or Creek Tribe of Indians, approved by Act of March 1, 1901, 31 Stat. 861, provided generally for the division of the tribal estate among the members of the Creek tribe. Section 28 provided:

> "No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.
>
> "All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, * * * shall be placed upon the rolls to be made by said Commission under said act of Congress, * * *
>
> * * * * * * *
>
> "The rolls so made by said Commission, when approved by the Secretary of the Interior, *shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made and to no other persons.*" (Italics ours)

Section 29 further provided:

> "Said Commission shall have authority to enroll as Creek citizens certain full-blood Creek Indians now residing in the Cherokee Nation, and also certain full-blood Creek Indians now residing in the Creek Nation who have recently removed there from the state of Texas, and families of full-blood Creeks who now reside in Texas, and such other recognized citizens found on the Creek rolls as might, by reason of nonresidence, be excluded from enrollment by section twenty-one of said act of Congress approved June twenty-eight, eighteen hundred and ninety-eight: Provided, That such nonresi-

dents shall, in good faith, remove to the Creek Nation before said Commission shall complete the rolls of Creek citizens as aforesaid."

The Act of April 26, 1906, 34 Stat. 137, provided for certain additional enrollments of citizens of the Five Civilized Tribes, and Section 2, provided in part:

"* * * That the rolls of the tribes affected by this Act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: * * *"

Under the above laws established by Congress governing the Creek Nation only those persons who are enrolled upon the final Creek rolls can now claim participation in any property of the Creek Nation.

Therefore, under the enrollment laws of the Creek Nation above quoted, in order to be enrolled as a member of the Creek tribe there were the following requisites:

1. An Indian must have been recognized by the Creek Nation as a Creek Indian, and his name must have been on the tribal membership rolls kept by the Creek tribe;
2. An Indian must have resided within or moved upon the Creek lands in Indian Territory;
3. An Indian must have been living on April 1, 1899, to entitle him to enrollment.

The Creek Indians who met these requirements were placed upon the Creek citizenship rolls prepared by the Dawes Commission, and these rolls have been made final as of March 4, 1907, under the provisions of the Act of April 26, 1906, 34 Stat. 137 (United States v. Wildcat, 244 U. S. 111; Campbell v. Wadsworth, 248 U. S. 169; United States v. Atkins, 260 U. S. 220). Only those Indians whose names are enrolled on these final citizenship rolls of the

Creek Nation can now claim to be Creek Indians, entitled to any distribution of Creek tribal property.

The Creek Nation, petitioner herein, represents all Creeks who are recognized as Creek Indians under the laws laid down by Congress—all those whose names appear on the final rolls of Creek citizens. Respondents not being on these rolls are not now considered as Creek Indians, and can have no possible interest in this proceeding.

We believe that the decision of the Court of Claims has overlooked these laws laid down by Congress, and under these laws respondents cannot claim to be Creek Indians entitled to participate in the distribution of Creek tribal assets.

III

The Court of Claims erred in holding that respondents are members of a "tribe, band, or other identifiable group of American Indians" within the meaning of the Indian Claims Commission Act (R. 109).

In this holding the Court of Claims failed to take into consideration the fact that respondents are not claiming as a tribe, band or identifiable group of American Indians but are seeking to enforce rights of individual ancestors to participate in Creek tribal money, by virtue of the membership of their ancestors in the Creek Nation in 1814. These would be individual claims and not tribal or group claims within the meaning of the Indian Claims Commission Act.

The Indian Claims Commission held that the Respondents were not a band, or other identifiable group of American Indians having a common claim against the United States, stating as follows (R. 91):

> "• • • In fact, the Perdido Band does not really question the right of petitioner to maintain the action,

for, as before stated, it asked that the members of the Creek Nation be awarded the amount prayed for, insisting, however, that the award be for the benefit of all Creek descendants and not confined to those enrolled under the various agreements with the Creek Nation, confirmed by Acts of Congress.

"This Commission decided in the Loyal Creek case, Docket No. 1, and the Western Cherokee case, Docket No. 24, that an 'identifiable group,' under the Indian Claims Commission Act, must have a common claim, and that a common suit for individual claims does not create an identifiable group. It is plain from the statements in the amended motion and the allegations of the petition accompanying it that the Perdido Band has no common claim, and is therefore not an 'identifiable group' under said Act.

"Furthermore, the Perdido Band is in reality asking us to determine the individual Indians who may participate in any award that may be made. They pray in their petition that the members of the Perdido Band be declared entitled to share in the recovery or that a Commission be created to make a roll of the living descendants of the original Creek Nation in order to determine who shall be entitled to share in any recovery. Counsel for applicants mistake the powers of the Indian Claims Commission. The Act authorizes us to determine claims of Indian tribes, bands or identifiable groups. We have no power to determine the membership of the groups who may successfully prosecute their claims, for that is an administrative function over which we have no control."

The amended motion and petition show that Respondents have recently organized, and are not recognized by the Secretary of the Interior. They are seeking here to assert no claim based upon any Creek treaty or agreement made for their particular benefit, or under any treaty made solely by Respondents with the United States. They are merely attempting to assert claims of certain individual ancestors

who they claim in 1814 were members of the Creek Nation. In other words, the rights sought to be enforced are those of Respondents' ancestors in Creek tribal property.

What Respondents seek to have the Commission do is to examine each Respondent's proof of ancestry back to 1814 to determine whether his ancestor was a Creek Indian living at that time entitled to membership in the Creek Nation. Each of Respondents' rights would depend upon different facts. In reality, the Respondents ask the Indian Claims Commission to do now what the Dawes Commission was directed to do from 1896 to 1907—to determine their rights to enrollment in the Creek Nation of Indians. We do not believe that Congress intended the Indian Claims Commission to be an enrolling agency. It is evident that such would not be a common claim, but a group of individual claims each depending entirely upon its own facts (Blackfeather v. United States, 37 C. Cls. 233, 190 U. S. 368).

The fact that Respondents' ancestors from 1832 to date —a period of 119 years—have never heretofore asserted any rights as Creek Indians to any Creek tribal property is quite significant. Had the ancestors of Respondents possessed any such rights it is more than likely they would have asserted them long ago, and certainly they would have done so before the Dawes Commission, a body specifically directed to enroll all Creek Indians. But having slept all of these many years, the Respondents now seek to enforce purported rights as Creek Indians which their ancestors never before advanced.

The Indian Claims Commission has no authority to enforce purported rights of individual Indians claiming rights as against an organized and recognized tribe as now constituted, or to direct who are to be the members to participate in the distribution of the proceeds of any judgment that may be rendered in favor of the tribe. Nor do we believe that Congress intended by the passage of the In-

dian Claims Commission Act to brush aside all enrollment laws governing the Creek Nation, or to have the final rolls of the Creek Nation reopened to admit Respondents as members of the Creek Nation. Congress alone has authority to do that, and it has not done so.

The disputes which this Commission is authorized to decide are those between an Indian tribe, band, or other identifiable group having a common claim against the United States; * and not disputes between an Indian tribe and persons claiming to be members thereof.

Certainly the tribe, band, or other identifiable group authorized to sue the United States under the Indian Claims Commission Act must have been in existence and must have had some recognition of some kind as such from the United States before the passage of said act. No such band of which Respondents are members was in existence in 1814 or since. We do not believe that a band organized recently for the purpose of enforcing individual rights of ancestors having no vested treaty rights in Creek tribal property would meet the requirements of the act.

Respondents admit that they are not organized, and that they have never been recognized as a band by the United States; that they have made no treaties with the United States. Clearly Respondents cannot maintain their right to intervene in a suit brought by the Creek Nation of Indians, an organized and recognized tribe of American Indians, to settle a tribal claim which developed from the execution of a treaty made solely with the Creek Nation.

Actually the claims Respondents seek to assert here are against the Creek Nation, and not against the United States.

In 123 Am. St. Repts. p. 301, it is stated:

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* Hearings on H. R. 1198 and H. R. 1341, p. 77, before Committee on Ind. Affairs., H. of Rep., 79 Cong., 1st Sess.

> "The right of one claiming to be a tenant in common with the plaintiff in the property sued for to intervene was denied in McCracken v. Lewis (Miss.), 42 South. 671; but in that case the court was not acting under any statute creating the right to intervene, and where there is no such statute, the right of an adverse claimant is generally, if not universally, denied: Browning v. Randol, 69 Mo. 594; Britton v. Bohde, 85 Hum., 449, 32 N. Y. Supp. 882; Union T. Co. v. Boker, 26 Misc. Rep. 85, 56 N. Y. Supp. 550; Asheville Div. No. 13 v. Aston, 92 N. C. 578; Hillier v. Stewart, 26 Ohio St. 652."

We believe Congress in passing the Indian Claims Commission Act intended that the "tribe, band, or other identifiable group of American Indians" authorized to file suit under its terms, must have had some existence and recognition either by the Executive or Legislative branches of the United States prior to the passage of the Act, and we do not believe that Congress meant to confer upon the Indian Claims Commission powers to *create* a "tribe, band or other identifiable group of American Indians" never in existence or recognized as such before the passage of said Act. The whole purpose of the Act was to create a forum in which *recognized* tribes, bands or other identifiable groups of American Indians, whether organized or not, who had been wronged as a group by the United States, could settle their claims.

The decision of the Court of Claims has overlooked this purpose, and has attempted to create a band of Indians where none has heretofore existed. We believe that in this respect the Court has entered the political or legislative field, and has erred in not confining itself solely to the judicial field.

The Court of Claims refers to the decisions in the Red Lake, Pembina and White Earth Bands, Ind. Cl. Com. Docket No. 18-A (September 17, 1951), and Clyde F. Thompson, et al., on relation of the Indians of California,

Appeal No. 9, decided by the Court of Claims on May 6, 1952 in support of its holding (R. 109-111). In these cases the tribes at one time were in existence, and were tribes recognized as such by the United States. Under Section 10 of the Indian Claims Commission Act the descendants of former members of these former recognized tribes, as individuals, are permitted to file suit on behalf of all the descendants to settle claims of such tribes.

There is a clear distinction in the above cases and the matter before us. In this case the Perdido Band, now self-styled The Creek Nation East of the Mississippi was never an existing "tribe, band, or other identifiable group of American Indians," recognized as such by the Secretary of the Interior, or by Congress. This they admit (R. 61, 65). This being true, the Commission, or the Court of Claims, would have no power under the Indian Claims Commission Act to create a "tribe, band, or other identifiable group of American Indians," when none ever existed before the passage of the Indian Claims Commission Act.

The term "tribe, band or other identifiable group of American Indians", as used in the Indian Claims Commission Act, would be limited to a *recognized* tribe, band or other identifiable group of American Indians before the passage of said Act, whether in existence or not as such at the time of the passage of said Act. If not in existence at the time of the passage of the Indian Claims Commission Act, Section 10 permits the descendants of said recognized tribe, band, or identifiable group to present the claims of such tribe, band, or identifiable group, for and on behalf of same. If the tribe, band, or other identifiable group is still in existence, it has the exclusive right to prosecute its tribal claims against the United States under Section 10 of the Indian Claims Commission Act.

We submit that the Court of Claims erred in failing to apply this plain distinction, and in *creating* an identifiable

group of American Indians out of respondents, when none ever existed before the passage of the Indian Claims Commission Act.

Furthermore, the decision of the Court of Claims directs that "the method of determining the identity of such descendants to be provided for by Congress in making an appropriation to pay the award" (R. 114). We believe here also the Court has entered the legislative field, and is attempting to tell Congress how to legislate with respect to moneys belonging to the Creek Nation, notwithstanding the fact that Congress has already directed who shall be Creek citizens, and has further directed that (supra, p. 44):

> "The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made and to no other persons."

In the case before us the United States did the respondents no wrong, nor did the Creek Nation. By their own acts in electing to remain east when the whole Creek tribe was removed to the west, the respondents ancestors abandoned their tribal membership, and lost their rights as Creek Indians and members of the Creek Nation, if any they had.

Clearly the Indian Claims Commission was correct in its holding that respondents were not a "tribe, band, or other identifiable group of American Indians," presenting a common claim against the United States, and the Court of Claims was wrong in holding that they were.

IV

This case presents conflicting views by two tribunals on the same questions which should be resolved by this Court.

V

The questions involved arise under a comparatively new statute, and are common to many other pending cases before the Indian Claims Commission, which are being held up until these questions are resolved. The questions involving the construction of the Indian Claims Commission Act have not heretofore been passed upon by this Court.

Conclusion

For the reasons stated, the Creek Nation respectfully submits that this petition for a writ of certiorari should be granted.

THE CREEK NATION,
PAUL M. NIEBELL,
Attorney for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute and treaties involved	3
Statement	3
Reasons for granting the writ	7
Conclusion	18
Appendix	20

CITATIONS

CASES:

Cherokee Nation v. *Hitchcock*, 187 U.S. 294	17
Cherokee Nation v. *United States*, 270 U.S. 476	15
The Cherokee Nation v. *United States*, 40 C. Cls. 252, affirmed, 202 U.S. 101	15
Choate v. *Trapp*, 224 U.S. 665	18
Choctaw Nation v. *United States*, 120 C. Cls. 734, certiorari denied, 343 U.S. 955	18
Creek Nation v. *United States*, 77 C. Cls. 226	4, 13, 15
Gritts v. *Fisher*, 224 U.S. 640	17
Lowe v. *Fisher*, 223 U.S. 95	17
United States v. *The Loyal Band of Creek Indians et al.*, No. 48, O. T. 1951, certiorari denied, 342 U.S. 813	7
Montoya v. *United States*, 180 U.S. 261	8
Stephens v. *Cherokee Nation*, 174 U.S. 445	17
Taylor v. *Tayrien*, 51 F. 2d 884	18
United States v. *Ernest Risling et al., as the Representatives, and on Relation of the Indians of California*, No. , this Term	7
United States v. *Clyde F. Thompson et al., as the Representative of, and on the Relation of the Indians of California*, No. , this Term	7, 9
United States v. *Wright*, 53 F. 2d 300	15
Wallace v. *Adams*, 204 U.S. 415	17

STATUTES:

Treaty of August 7, 1790, 7 Stat. 35	12, 15
Treaty of June 29, 7 Stat. 56	12
Treaty of June 16, 1802, 7 Stat. 68	12, 15

Page

Treaty of November 14, 1805, 7 Stat. 96 12
Treaty of August 9, 1814, 7 Stat. 120 .....3, 12, 23
Treaty of January 22, 1818, 7 Stat. 171 12
Treaty of January 8, 1821, 7 Stat. 215 12
Treaty of January 24, 1826, 7 Stat. 286 .....3, 12, 15, 25
Treaty of March 24, 1832, 7 Stat. 366 .....3, 12, 13, 15, 32
Treaty of February 14, 1833, 7 Stat. 417 .....3, 12, 13, 15, 39
Treaty of November 23, 1838, 7 Stat. 574 12
Treaty of January 4, 1845, 9 Stat. 821 .....12, 15
Treaty of June 13, 1854, 11 Stat. 599 12
Treaty of August 7, 1856, 11 Stat. 699 .....3, 12, 14, 48
Treaty of June 14, 1866, 14 Stat. 785 12
Act of March 1, 1889, 25 Stat. 757 12
Act of March 1, 1901, 31 Stat. 861 12
Act of June 30, 1902, 32 Stat. 500 12
Act of April 30, 1908, 35 Stat. 70 18
Act of April 4, 1910, 36 Stat. 269 18
Act of June 30, 1913, 38 Stat. 77 18
Act of May 27, 1914, 38 Stat. 310 18
Act of August 1, 1914, 38 Stat. 582 18
Act of March 2, 1917, 39 Stat. 969 18
Act of June 30, 1919, 41 Stat. 3 18
Act of May 26, 1920, 41 Stat. 625 18
Act of February 13, 1925, 43 Stat. 939, Sec. 3 2
Act of June 7, 1925, 43 Stat. 726 18
Act of May 29, 1928, 45 Stat. 944 18
Act of February 14, 1931, 46 Stat. 1115, 1139 18
Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. 70, *et seq.* 2, 3
Sec. 2 .....8, 11, 20
Sec. 10 .....12, 21
Sec. 13 .....8, 21
Sec. 20 .....2, 22
Sec. 21 .....16, 22
Sec. 22 .....16, 23
28 U.S.C. (1946 ed.) 350 2
28 U.S.C. 1255 2

MISCELLANEOUS:

Hearings of the Senate Committee on Indian Affairs on S. 2731, 74th Cong., 1st Sess., p. 40 9
Hearings before the House Committee on Indian Affairs, on H. R. 1198 and 1341, 79th Cong., 1st Sess. 9

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 247

THE UNITED STATES OF AMERICA, *Petitioner*

v.

C. W. McGHEE, RUBY Z. WEATHERFORD, JOHN V. PHILLIPS and JOHN WILIAMS, as Members of and on the Relation of the Creek Nation East of the Mississippi

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered on May 6, 1952, in the above case.

OPINIONS BELOW

The opinion of the Indian Claims Commission (R. 87-92) is not reported. The opinion of the Court of Claims (R. 98-114) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered May 6, 1952 (R. 114-115). The jurisdiction of this Court rests upon 28 U.S.C. 1255.[1]

QUESTIONS PRESENTED

1. Whether the Indian Claims Commission Act, authorizing suit against the United States by "any tribe, band, or other identifiable group of American Indians," confers jurisdiction of a suit by a recently organized aggregation of alleged descendants of members of the Creek Nation who did not move west with the tribe in 1836 and whom neither Congress nor other Indians have ever recognized as an entity.

2. Whether such a "group" may intervene in a suit under the Act instituted by the Creek Nation, in view of Section 10 of the Act which provides that "whenever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians."

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[1] The Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. 70s, provides in section 20(c) that the determination of questions by law by the Court of Claims shall be subject to review by this Court in the manner prescribed by section 3 of the Act of February 13, 1925, 43 Stat. 939, which now has been superseded by 28 U.S.C. 1255. Since the Act makes no provision as to the time for filing a petition for certiorari, the general provisions of 28 U.S.C. (1946 ed.) 350 would appear to be applicable.

3. Whether the court below incorrectly assumed the functions of Congress in determining what disposition is to be made of the judgment and who are the members of an Indian tribe entitled to benefit from an award under the Act.

STATUTE AND TREATIES INVOLVED

The relevant portions of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. 70, *et seq.;* the Treaty of August 9, 1814, 7 Stat. 120; the Treaty of January 24, 1826, 7 Stat. 286; the Treaty of March 24, 1832, 7 Stat. 366; the Treaty of February 14, 1833, 7 Stat. 417; and the Treaty of August 7, 1856, 11 Stat. 699, are set out in the Appendix, *infra,* pp. 20-51.

STATEMENT

The Creek Nation instituted a suit in the Indian Claims Commission to recover the value of 22,267,600 acres of land in Alabama and Georgia allegedly taken from it without compensation by the United States under the Treaty of August 9, 1814, 7 Stat. 120, *infra,* pp. 23-25 (R. 1-37). The Creek Nation originally occupied that and other areas in the southeastern United States. Pursuant to Treaties of January 24, 1826, 7 Stat. 286, *infra,* pp. 25-32, and March 24, 1832, 7 Stat. 366, *infra,* pp. 32-39, in which the Creek Nation ceded all its remaining property in the east to the United States, "the whole tribe" was moved in 1836 and

1837 to lands set aside for it in Indian Territory, now Oklahoma. *The Creek Nation* v. *United States,* 77 C. Cls. 226, 243 (Finding XIII). The few individual Creeks who remained east of the Mississippi became United States citizens, abandoned their tribal relationships, maintained no tribal organization, and had no dealings, as a group, with the United States or tribes of other Indians (R. 90, 105).

The case instituted by the Creek Nation was tried at length and submitted. After that, but before decision, the respondents, four named individuals then calling themselves "The Perdido Friendly Creek Indian Band of Alabama and Northwest Florida Indians," moved to intervene (R. 4-5). They alleged that they were a group "recently organized" and "not yet recognized by the Secretary of the Interior," comprised of descendants of members of the Creek Nation who remained in the East (R. 61). They stated that they "do not seek to re-open the record for the taking of additional testimony" on the merits of the claim or the amount of damages but "desire to offer only whatever additional proof this Commission desires in order to establish (a) That the injury was one to the Creek Nation as it existed prior to migration, (b) that all descendants of members of such Creek Nation are entitled to recover therefor, and (c) that applicants are members of such class" (R. 63). They asked that they

"be declared entitled to share in said recovery on a per capita basis with all others who come before this Commission and establish that they are descendants of the members of the original Creek nation or, in the alternative, that a commission be created to determine and make a roll of the living descendants of members of the original Creek nation in order to determine who shall be entitled to share in any recovery" (R. 69).

The motion was opposed both by the Creek Nation and the United States. The grounds were primarily (a) that these Indians are not a "tribe, band, or other identifiable group of American Indians" as required by Section 2 of the Indian Claims Commission Act, *infra*, p. 20, (b) that under Section 10 of the Act the recognized Creek Nation has "the exclusive privilege of representing such Indians," and (c) that the petition to intervene was actually no more than a request to participate in any judgment awarded, a matter outside the jurisdiction of the Commission which cannot decide what disposition is to be made of any judgment nor the question of membership in an Indian tribe (R. 77-86).

The Indian Claims Commission denied the motion to intervene (R. 86-87). It held that the Creek Nation has the exclusive right to prosecute the claim, that the Perdido Band is not an "identifiable group" under the Act, and that "a common suit for individual claims" is not "a common

claim" required by the Act. In addition, it stated (R. 91):

> Furthermore, the Perdido Band is in reality asking us to determine the individual Indians who may participate in any award that may be made. They pray in their petition that the members of the Perdido Band be declared entitled to share in the recovery or that a Commission be created to make a roll of the living descendants of the original Creek Nation in order to determine who shall be entitled to share in any recovery. Counsel for applicants mistake the powers of the Indian Claims Commission. The Act authorizes us to determine claims of Indian tribes, bands or identifiable groups. We have no power to determine the membership of the groups who may successfully prosecute their claims, for that is an administrative function over which we have no control.

After the decision, the "Perdido Friendly Creek Indian Band of Alabama and Northwest Florida Indians" was allowed by the Commission to change the name in which intervention was sought to "The Creek Nation East of the Mississippi" (R. 96).

The Court of Claims reversed the Commission (R. 114-115). It allowed intervention, stating that "in the event of an award for such an injury, it should be for the benefit of all descendants of the

Creek Nation as it was constituted in 1814, and recognized by the United States in the treaty of cession of that year, the method of determining the identity of such descendants to be provided for by Congress in making an appropriation to pay the award"[2] (R. 114).

REASONS FOR GRANTING THE WRIT

In this case, as in others now before the Court,[3] the Court of Claims has reversed the Indian Claims Commission to allow an aggregation of an unknown number of unidentified, scattered persons to associate themselves as a group and sue the United States under the Indian Claims Commission Act, *infra*, pp. 20-23. Unless corrected here, these wrong but basic precedents under the Act will inhibit intelligent and proper handling of many cases pending before the Commission which are extraordinarily complex and involve large sums of money.

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[2] Since the decision by the Court of Claims, the Commission has found that the Creek Nation is entitled to recover $1,769,940, less allowable offsets.

[3] The comparable cases of *United States* v. *Clyde F. Thompson et al., as the Representatives of, and on the Relation of the Indians of California*, No. 245, this Term, and *United States* v. *Ernest Risling et al., as the Representatives, and on Relation of the Indians of California*, No. 246, this Term, are now on petitions for writs of certiorari to review decisions of the Court of Claims. An earlier case on the same point was *United States* v. *The Loyal Band of Creek Indians et al.*, No. 48, O. T. 1951, certiorari denied, 342 U. S. 813.

1. Section 2 of the Act provides for the hearing of claims on behalf of any "tribe, band, or other identifiable group of American Indians." In no sense do respondents meet that important jurisdictional requirement.

a. This Court has defined a tribe or band of Indians as a group "united in a community under one leadership or government" with "independence of action, continuity of existence, a common leadership and concert of action." *Montoya* v. *United States,* 180 U. S. 261, 266. Congress plainly intended the "other identifiable group," as used in the Indian Claims Commission Act, to possess characteristics of that nature. For Indians, like other people, belong to any number of identifiable groups, and "other identifiable group" would lose all significance if the rule of *ejusdem generis* is not applied so as to restrict it to a unit, such as a "tribe" or "band", with a group claim. The Act itself implies that limitation in Section 13(a), *infra,* pp. 21-22, by qualifying the phrase "identifiable group" with the words *"existing as distinct entities,* residing within the territorial limits of the United States and Alaska" (italics supplied).

Sponsors of the legislation before Congress made that quite clear:—the group intended was "a communal group, a group with historic identity, and not just a detached group of people who got together and made out they were a group so as to get into this court. * * * The essential thing is

that they have * * * a common claim of a group character." Hearings of the Senate Committee on Indian Affairs on S. 2731, 74th Cong., 1st Sess., p. 40. The law "only relates to tribal claims or claims of bands. * * * It would not cover individual claims of Indians." Hearings before the Committee on Indian Affairs, H. of Reps., on H. R. 1198 and 1341, 79th Cong., 1st Sess., p. 77. See, for further discussion, Petition for a Writ of Certiorari, *United States* v. *Thompson et al.*, No. 243, this Term, pp. 15-19.

It was most emphatically not the Congressional purpose to permit individual Indians, unconnected with an existing Indian community, to prosecute suits for wrongs done to their ancestors or to a tribe or band of which their ancestors were members. Congress designed the Indian Claims Commission for the common claims of true Indian groups now existing as organized entities. It did not open the door to permit every person in the United States with Indian blood—no matter how long ago he or his family may have dropped all affiliation with such a true Indian group—to vindicate injuries done to his forebears.

b. Respondents do not fall within the statutory category because they are not such a true group, and their claim is not a common one. By their own admissions, they are no more than "a detached group of people who got together and made

out they were a group to get into this court" (*supra*, p. 8). They state that they are only "recently organized" and that they have "not yet been recognized by the Secretary of the Interior" (R. 61). They have never acted in concert except in this instance. They ask that a roll be made of the living descendants of individual members in the Creek Nation as of 1814 to determine who they are (R. 69). They changed their choice of a name during the course of these proceedings (R. 96). For over a hundred years, the few Creek Indians who remained in the East and their descendants have regarded themselves and been regarded by others as unaffiliated, individual citizens of the United States, who had abandoned their tribal relationships, maintained no tribal organization, and had no dealings, as a group, with the United States, with tribes of other Indians, or with anyone else (R. 61, 90, 105).

Not only do respondents fail as a "tribe", "band", or "identifiable group", but it is clear that their claim is an aggregate of individual claims rather than a common, group claim. If a claim arose in 1814, it was a tribal claim in favor of the Creek Nation. There is, as will be shown (*infra*, pp. 11-15), an existing Creek Nation which possesses any such claim exclusively and entirely. Moreover, respondents are not suing as the Creek Nation. Instead, they are suing as a "group" whose ancestors belonged to the Creek Nation.

They relate their claim to the inchoate rights of individual ancestors of individual members to participate in Creek tribal money. The Court of Claims, contrary to the Commission, said that this is a group claim, not a collection of individual claims. But the individual ancestors were not a group apart from the Creek Nation when the claim arose; they were merely a number of individual Creeks who did not move with the Nation. Their claims, if any, are individual claims to participate in an award to the Creek Nation, and not a separate, common group claim. It follows that the association of the respondents does not constitute them a "tribe, band, or other identifiable group" *existing as a distinct entity,* with a claim peculiar to it, entitled to invoke the jurisdiction of the Commission.[4]

2. Furthermore, jurisdiction of respondents' claim was prohibited by Congress as expressly as could be done without mentioning it by name in a statute of general application. The Court of Claims did not mention that prohibition. Section

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[4] Even if respondent's association be considered a kind of grouping within the Creek Nation, it cannot bring an action before the Commission. Section 2 does not authorize recognition, as an "identifiable group", of fragments of the tribe, band, or group in whose favor the claim accrued. Necessarily, to avoid confusion and multiplicity of suits, the criterion must be that the "identifiable group" have a claim peculiar to it which is not shared by the tribe, band, or larger group.

10 of the Indian Claims Commission Act, *infra*, p. 21, provides that "wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the *exclusive* privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission."[5]

There is such a tribal organization here. The officials of the Creek Nation have been recognized consistently and exclusively as having authority to represent the Creek Indians since 1790.[6] There has never been more than one Creek Nation. Recognition of the Creek Nation as representative of all Creek Indians in tribal matters was not affected by removal of the tribe to the West between 1828 and 1837.[7] The Court of Claims stated (R. 102-103) that: "Subsequent to 1833, treaties in-

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[5] Italics supplied unless otherwise indicated.

[6] *E.g.*, Treaties and Acts of August 7, 1790, 7 Stat. 35; June 29, 1796, 7 Stat. 56; June 16, 1802, 7 Stat. 68; November 14, 1805, 7 Stat. 96; August 9, 1814, 7 Stat. 120; January 22, 1818, 7 Stat. 171; January 8, 1821, 7 Stat. 215; January 24, 1826, 7 Stat. 286; March 24, 1832, 7 Stat. 366; February 14, 1833, 7 Stat. 417; November 23, 1838, 7 Stat. 574; January 4, 1845, 9 Stat. 821; June 13, 1854, 11 Stat. 599; August 7, 1856, 11 Stat. 699; June 14, 1866, 14 Stat. 785; March 1, 1889, 25 Stat. 757; March 1, 1901, 31 Stat. 861; June 30, 1902, 32 Stat. 500.

[7] Temporary groups necessarily existed while the Creeks were in process of moving west in sections, but these did not endure nor replace the over-all dominion of the Creek Nation.

volving Creek Indians were between the United States and the new tribal organization of Western Creeks and related to property and affairs of those Creeks in Oklahoma." But there was no "new tribal organization", based on the fact of moving west, which limited itself to "property and affairs of those Creeks in Oklahoma." As the Court of Claims found as a fact, in *Creek Nation* v. *United States,* 77 C. Cls. 226, 243, "the Federal Government decided it was necessary to remove *the whole Nation* to its boundary west of the Mississippi River, and with the exception of about 600 Creek warriors who had enlisted in the Federal service against the Seminoles, and the families of such warriors, *the whole tribe,* under a military escort, was removed during the summer and fall of 1836. These warriors and their families were removed to the West after the termination of Seminole hostilities in 1837."[8]

Article III of the Treaty of March 24, 1832, 7 Stat. 366, *infra,* pp. 33-34, provided that any individual Creek Indian might sell his allotment in the East and move to the lands set aside for the Creek Nation in the West. Article IV of the Treaty of February 14, 1833, 7 Stat. 417, *infra,* pp. 45-46, stated:

> It is hereby mutually understood and agreed between the parties to this treaty, that the

[8] The Indian Claims Commission also found below that the Creek Nation has always been a single entity (R. 90, 91).

> land assigned to the Muskogee Indians, by the second article thereof, shall be taken and considered the property of the whole Muskogee or Creek nation, as well of those now residing upon the land, as the great body of said nation who still remain on the east side of the Mississippi * * *.

Article V of the Treaty of August 7, 1856, 11 Stat. 699, *infra,* pp. 48-51, between the United States "and the Creek and Seminole Tribes of Indians," provides:

> The Creek Indians do hereby, absolutely and forever, quitclaim and relinquish to the United States all their right, title, and interest in and to any lands heretofore owned or claimed by them, whether east or west of the Mississippi River, and any and all claims for or on account of any such lands, except those embraced within the boundaries described in the second article of this agreement; and it doth also, in like manner, release and fully discharge the United States from all other claims and demands whatsoever, which the Creek Nation or any individual thereof may now have against the United States, excepting only such as are particularly or in terms provided for and secured to them by the provisions of existing treaties and laws; and which are as follows * * *.

That Article then listed all annuities due the Creek Nation under the Treaties of August 7, 1790, June 16, 1802, January 24, 1826, and March 24, 1832, with the Creek Nation when it was east of the Mississippi, and under the Treaties of February 14, 1833, and January 4, 1845, with the Creek Nation in its new location west of the Mississippi. Article VII provided that all annuities in money due the Creek Nation under those former treaties shall be paid to the Treasurer of the Creek Nation. Thus, the Creek Nation, then in the West, regarded itself and was recognized by the United States as the same entity as the Creek Nation when it was in the East. The Court of Claims, contrary to its present view, acknowledged this in *Creek Nation* v. *United States, supra,* when it said (p. 263): "The Creek Nation as a tribe expressly waived all tribal claims and demands against the United States in the treaty of 1856."[9]

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[9] In its opinion below, the Court of Claims relied heavily (R. 105, 106) on *The Cherokee Nation* v. *United States,* 40 C. Cls. 252, affirmed, 202 U. S. 101. But unlike the Creeks, there is a long history in relation to claims of two bands of Cherokee Indians who moved west at different times and were reunited in a common government in 1846. See *Cherokee Nation* v. *United States,* 270 U.S. 476, 479; *United States* v. *Cherokee Nation, supra,* 202 U.S. at pp. 126-129. There was still another group of Cherokees who separated themselves from their tribe, remained in North Carolina, and were later recognized by Congress as a distinct "collective body or tribe" over which the federal guardianship has been exercised in many ways. See *United States* v. *Wright,* 53 F. 2d 300, 306-307 (C.A. 4).

3. In addition to disregarding the jurisdictional provisions of the Indian Claims Commission Act, the Court of Claims has taken to itself the function of Congress in holding that "in the event of an award for such injury, it should be for the benefit *of all descendants* of the Creek Nation as it was constituted in 1814, and recognized by the United States in the treaty of cession of that year, the method of determining the identity of such descendants to be provided for by Congress in making an appropriation to pay the award" (R. 114). Neither the Commission nor the Court of Claims has authority to determine what disposition is to be made of any judgment. Congress alone has that power. It has not authorized the disposition which the Court of Claims has here made, nor has it prescribed the method for determining what individuals are to share in, or benefit from, an award. Section 21 of the Act merely provides that the Commission shall "submit its report to Congress" and Section 22(a) provides that when the report has been filed with Congress "there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission." *Infra,* pp. 22-23.

The Court of Claims has not been authorized by Congress to determine for itself the membership of a tribe or group which is to be the bene-

ficiary of a new tribal fund.[10] There is a presently existing roll of the members of the Creek Nation compiled pursuant to Act of Congress (R. 103). The Act does not empower the Commission or the Court of Claims to direct Congress to include in those rolls, as beneficiaries of the Nation's tribal fund in this particular, Indians whom Congress has thus far excluded and who have not been associated with it for over one hundred years. In the absence of such delegated authority, the matter is purely one for Congress. "The power of Congress over the matter of citizenship in these Indian tribes [is] plenary" and "the administrative control of the Government over the tribal property of tribal Indians [is] subject to change by Congress at any time before it was carried into effect and while the tribal relations continued." *Wallace* v. *Adams,* 204 U.S. 415, 423; *Gritts* v. *Fisher,* 224 U.S. 640, 648; *Stephens* v. *Cherokee Nation,* 174 U.S. 445, 488; *Cherokee Nation* v. *Hitchcock,* 187 U.S. 294, 306-307; *Lowe* v. *Fisher,* 223 U.S. 95.

Similarly, the court cannot direct Congress to pay "all descendants" individually. This disposition, which the court may have intended (R. 114), means that it has adjudicated rights which would vest in individuals when their identity has been

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[10] It is noteworthy that the respondent "group" and the present Creek Nation together do not include "all descendants of the Creek Nation as it was constituted in 1814."

determined—contrary to the concept of group claims and group rights with which the Act exclusively deals. So long as funds remain tribal in character, as they must to the Commission and the Court of Claims under the Act, no individual has any vested rights therein. *Choate* v. *Trapp*, 224 U.S. 665; *Taylor* v. *Tayrien*, 51 F. 2d 884 (C.A. 10). Congress has long exercised a right to direct that Creek tribal funds be used for a variety of purposes, such as the payment of attorney fees, paving of streets and laying of sidewalks, paying individual claims, paying assessments for drainage districts, calling special meetings of the Creek Tribal Council, and for other purposes.[11] By holding that individual Creeks are entitled to the award, the court may have made it impossible for Congress to do anything other than distribute the award per capita, since individual Indian rights cannot be impaired by legislative action any more than the rights of other citizens of the United States. *Choate* v. *Trapp*, 224 U.S. 665; *Choctaw*

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[11] Acts of April 4, 1910, 36 Stat. 269, 282; March 2, 1917, 39 Stat. 969, 984; June 30, 1919, 41 Stat. 3, 24; May 29, 1928, 45 Stat. 944; February 14, 1931, 46 Stat. 1115, 1139; June 30, 1913, 38 Stat. 77; May 26, 1920, 41 Stat. 625; June 7, 1925, 43 Stat. 726; April 30, 1908, 35 Stat. 70, 91; May 27, 1914, 38 Stat. 310; August 1, 1914, 38 Stat. 582.

Nation v. *United States,* 120 C. Cls. 734, certiorari denied, 343 U.S. 955.[12]

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1952.

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[12] The error of the Court of Claims in these respects is not cured by its statement that "the method of determining the identity of such descendants to be provided for by Congress in making an appropriation to pay the award" (R. 114). The vital error is the unauthorized holding that the disposition of the award must be for "all descendants."

APPENDIX

1. The relevant portions of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. 70, et seq., provide:

> SEC. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed

to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of approval of this Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

* * * *

SEC. 10. Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian Tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission.

* * * *

SEC. 13. (a) As soon as practicable the Commission shall send a written explanation of the provisions of this Act to the recognized

head of each Indian tribe and band, and to any other identifiable groups of American Indians existing as distinct entities, residing within the territorial limits of the United States and Alaska, and to the superintendents of all Indian agencies, who shall promulgate the same, and shall request that a detailed statement of all claims be sent to the Commission, together with the names of aged or invalid Indians from whom depositions should be taken immediately and a summary of their proposed testimonies.

* * * *

SEC. 20. (c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 3 of the Act of February 13, 1925 (43 Stat. 939; 28 U.S.C., sec. 288), as amended.

* * * *

SEC. 21. In each claim, after the proceedings have been finally concluded, the Commission shall promptly submit its report to Congress.

The report to Congress shall contain (1) the final determination of the Commission; (2) a transcript of the proceedings or judgment upon review, if any, with the instructions of

the Court of Claims; and (3) a statement of how each Commissioner voted upon the final determination of the claim.

* * * *

SEC. 22 (a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

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2. The relevant portion of the Treaty of August 9, 1814, 7 Stat. 120, provides:

1st—The United States demand an equivalent for all expences incurred in prosecuting the war to its termination, by a cession of all the territory belonging to the Creek nation within the territories of the United States, lying west, south, and south-eastwardly, of a line to be run and described by persons duly authorized and appointed by the President of the United States—Beginning at a point on

the eastern bank of the Coosa river, where the south boundary line of the Cherokee nation crosses the same; running from thence down the said Coosa river with its eastern bank according to its various meanders to a point one mile above the mouth of Cedar creek, at Fort Williams, thence east two miles, thence south two miles, thence west to the eastern bank of the said Coosa river, thence down the eastern bank thereof according to its various meanders to a point opposite the upper end of the great falls, (called by the natives Woetumka,) thence east from a true meridian line to a point due north of the mouth of Ofucshee, thence south by a like meridian line to the mouth of Ofucshee on the south side of the Tallapoosa river, thence up the same, according to its various meanders, to a point where a direct course will cross the same at the distance of ten miles from the mouth thereof, thence a direct line to the mouth of Summochico creek, which empties into the Chatahouchie river on the east side thereof below the Eufaulau town, thence east from a true meridian line to a point which shall intersect the line now dividing the lands claimed by the said Creek nation from those claimed and owned by the state of Georgia: Provided, nevertheless, that where any possession of any chief or warrior of the Creek nation, who shall

have been friendly to the United States during the war, and taken an active part therein, shall be within the territory ceded by these articles to the United States, every such person shall be entitled to a reservation of land within the said territory of one mile square, to include his improvements as near the centre thereof as may be, which shall inure to the said chief or warrior, and his descendants, so long as he or they shall continue to occupy the same, who shall be protected by and subject to the laws of the United States; but upon the voluntary abandonment thereof, by such possessor or his descendants, the right of occupancy or possession of said lands shall devolve to the United States, and be identified with the right of property ceded hereby.

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3. Treaty of January 24, 1826, 7 Stat. 286, provides:

Whereas a treaty was concluded at the Indian Springs, on the twelfth day of February last, between Commissioners on the part of the United States, and a portion of the Creek Nation, by which an extensive district of country was ceded to the United States.

And whereas a great majority of the Chiefs and Warriors of the said Nation have protested against the execution of the said Treaty,

and have represented that the same was signed on their part by persons having no sufficient authority to form treaties, or to make cessions, and that the stipulations in the said Treaty are, therefore, wholly void.

And whereas the United States are unwilling that difficulties should exist in the said Nation, which may eventually lead to an intestine war, and are still more unwilling that any cessions of land should be made to them, unless with the fair understanding and full assent of the Tribe making such cession, and for a just and adequate consideration, it being the policy of the United States, in all their intercourse with the Indians, to treat them justly and liberally, as becomes the relative situation of the parties.

Now, therefore, in order to remove the difficulties which have thus arisen, to satisfy the great body of the Creek Nation, and to reconcile the contending parties into which it is unhappily divided, the following articles have been agreed upon and concluded, between James Barbour, Secretary of War, specially authorised as aforesaid, and the said Chiefs and Head Men representing the Creek Nation of Indians:

ARTICLE 1.

The Treaty concluded at the Indian Springs, on the twelfth day of February, one thousand

eight hundred and twenty-five, between Commissioners on the part of the United States and the said Creek Nation of Indians, and ratified by the United States on the seventh day of March, one thousand eight hundred and twenty-five, is hereby declared to be null and void, to every intent and purpose whatsoever; and every right and claim arising from the same is hereby cancelled and surrendered.

ARTICLE 2.

The Creek Nation of Indians cede to the United States all the land belonging to the said Nation in the State of Georgia, and lying on the east side of the middle of the Chatahoochie river. And, also, another tract of land lying within the said State, and bounded as follows: Beginning at a point on the western bank of the said river, forty-seven miles below the point where the boundary line between the Creeks and Cherokees strikes the Chatahoochie river, near the Buzzard's Roost, measuring the said distance in a direct line, and not following the meanders of the said river; and from the point of beginning, running in a direct line to a point in the boundary line, between the said Creeks and the Cherokees, thirty miles west of the said Buzzard's Roost; thence to the Buzzard's Roost, and thence with the middle of the said river to the place of beginning.

ARTICLE 3.

Immediately after the ratification of this Treaty, the United States agree to pay to the Chiefs of the said Nation the sum of two hundred and seventeen thousand six hundred dollars to be divided among the Chiefs and Warriors of the said Nation.

ARTICLE 4.

The United States agree to pay to the said Nation an additional perpetual annuity of twenty thousand dollars.

ARTICLE 5.

The difficulties which have arisen in the said nation, in consequence of the Treaty of the Indian Springs, shall be amicably adjusted, and that portion of the Creek Nation who signed that treaty shall be admitted to all their privileges, as members of the Creek Nation, it being the earnest wish of the United States, without undertaking to decide upon the complaints of the respective parties, that all causes of dissatisfaction should be removed.

ARTICLE 6.

That portion of the Creek Nation, known as the friends and followers of the late General William McIntosh, having intimated to the government of the United States their wish to remove west of the Mississippi, it is

hereby agreed, with their assent, that a deputation of five persons shall be sent by them, at the expense of the United States, immediately after the ratification of this treaty, to examine the Indian country west of the Mississippi, not within either of the States or Territories, and not possessed by the Choctaws or Cherokees. And the United States agree to purchase for them, if the same can be conveniently done upon reasonable terms, wherever they may select, a country, whose extent shall, in the opinion of the President, be proportioned to their numbers. And if such purchase cannot be thus made, it is then agreed that the selection shall be made where the President may think proper, just reference being had to the wishes of the emigrating party.

ARTICLE 7.

The emigrating party shall remove within twenty-four months, and the expense of their removal shall be defrayed by the United States. And such subsistence shall also be furnished them, for a term not exceeding twelve months after their arrival at their new residence, as, in the opinion of the President, their numbers and circumstances may require.

ARTICLE 8.

An agent, or sub-agent and Interpreter, shall be appointed to accompany and reside